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ALEXANDER I. STEVAS,
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In the Supreme Court of the United States

October Term, 1982

MORRIS THIGPEN, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under the United States Supreme Court's holding in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

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vs.

BARRY JOE ROBERTS,
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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on November 16, 1982.

OPINIONS BELOW

The Report and Recommendation and Orders of the United States District Court for the Northern District of Mississippi, which are unreported, are set out in the appendix, *infra*, p. A1 to p. A6. The opinion of the United States Court of Appeals for the Fifth Circuit which is unreported, is set out in the appendix, *infra*, p. A7.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1982 (App., *infra*, p. A7). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent was indicted, tried and convicted of manslaughter by means of culpable negligence in the Circuit Court of Tallahatchie County, Mississippi. Respondent was sentenced to serve twenty (20) years in the custody of the Mississippi Department of Corrections.

Respondent's trial and conviction on the manslaughter charge resulted from a tragic collision on August 6, 1977, between an automobile driven by Respondent and a pickup truck, in which collision a ten-year-old child was killed. Shortly after the accident, Respondent was cited by a Mississippi Highway Patrolman for driving under the influence, driving on the wrong side of the road, driving with a suspended license, and reckless driving. On August 13, 1977, Respondent was tried and convicted on these charges by a Tallahatchie County Justice Court Judge; on the same date, Respondent appealed the convictions to the Circuit Court of Tallahatchie County pursuant to Miss. Code Ann. § 99-35-1. Before the misdemeanor charges

were retired on appeal, Respondent was indicted by the Tallahatchie County Grand Jury for manslaughter of the child killed in the traffic collision. Trial of the Respondent on the misdemeanors thereafter was consolidated with trial of the manslaughter charge, but the misdemeanor appeals were nolle prossed during the consolidated trial.

On or about March 13, 1981, Respondent filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District of Mississippi. Respondent assigned as grounds for relief the following:

1. The trial court erred in permitting the petitioner to be indicted and tried upon a set of facts and circumstances which formed the basis for previous justice court charges for which the petitioner had been tried, convicted, and sentenced.
2. The trial court erred in vacating its order denying petitioner a special venire and later during the trial declaring that a special venire had in fact been given and petitioner's trial attorney was negligent in not objecting to same.
3. The trial court erred in permitting the State to consolidate the misdemeanor appeals and to receive evidence relating to same during trial of the related felony count and petitioner's trial attorney was grossly negligent in not objecting to same.
4. The legal representation of the petitioner at the trial level and at the initial appellant submission was grossly incompetent and prejudicially negligent and entitles the petitioner to a new trial.

On April 20, 1981, Petitioners filed their Answer denying that Respondent was entitled to any habeas corpus relief.

On November 3, 1981, the Magistrate filed his Report and Recommendation recommending that Respondent be granted habeas relief.

On December 8, 1981, Petitioners filed their Objections to the Magistrate's Report and Recommendation.

On January 18, 1982, Judge L. T. Senter, Jr., United States District Judge for the Northern District of Mississippi filed his Order granting Respondent habeas corpus relief and adopting the Magistrate's Report and Recommendation.

On March 30, 1982, Petitioners filed their brief in the Fifth Circuit Court of Appeals and Argument was had in August, 1982.

The Court of Appeals affirmed the District Court's judgment on November 16, 1982.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the opinion of the United States Court of Appeals for the Fifth Circuit is contra to the law of double jeopardy as decided in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

ARGUMENT

The Court of Appeals Applied the Incorrect Standard of Review When It Held That Roberts Has a Substantial Double Jeopardy Claim Under the United States Supreme Court's Holding in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

Addressing the double jeopardy question, the District Court adopting the Magistrate's Report and Recommendation states:

It is thus apparent that manslaughter by automobile in violation of § 97-3-47 cannot be proved without at the same time proving reckless driving in violation of § 63-3-1201, and that conduct of petitioner that constituted reckless driving—losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle—is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction. [Emphasis Added].

Petitioner would note to the Court that § 63-3-1201 and the conduct before the accident are considered "traffic offenses" in Mississippi. Those offenses consist wholly of the conduct of an operation of a motor vehicle upon the highways of this state and do not involve a wrongful homicide. The crime of manslaughter involves a wrongful homicide, an element altogether lacking in the traffic offenses.

Section 63-3-1201, Reckless Driving, requires that the vehicle be driven on the highways of this state before a citation can be issued. A motorist could not be given

a citation for driving recklessly in a private parking lot, however, that same motorist could be guilty of manslaughter under § 97-3-47 for the unintentional killing of someone in that private parking lot. It is clear that the two offenses are distinct both in law and fact. The traffic offenses are not lesser degrees of the crime of manslaughter.

As stated in Annot. 172 A.L.R. 1053 (1948), *Acquittal of One Offense in Connection With Operation of Automobile As Bar to Prosecution of Another*.

... it should be borne in mind that there is a distinction between an offense and the unlawful act out of which it arises and that *the rule that a person shall not be twice put in jeopardy for the same offense is directed to the identity of the offense and not to the act.* [Emphasis Added].

... where two offenses, committed in the operation of a motor vehicle, are separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other, even though both offenses were committed at the same time and by the same act.

The Court in *Bacom v. Sullivan*, 200 F.2d 70 (5 Cir. 1952), cert. denied, 345 U.S. 910, 73 S.Ct. 651, 97 L.Ed. 1345 (1953) stated:

To constitute double jeopardy, it is not enough that the second prosecution arises out of the same facts as the first. It must be for the same 'offense.' The same act may constitute an offense against two separate statutes. The recognized test for determining the identity or separateness of offenses charged in two indictments is whether or not the same proof will sustain a conviction under both or whether one requires

proof of facts, not required by the other. *Chrysler v. Zerbst*, 10 Cir., 81 F.2d 975; *McGinley v. Hudspeth*, 10 Cir., 120 F.2d 523.

If one statute requires proof of a fact which the other statute does not, then the offenses are not the same, and a conviction or acquittal under one does not bar a prosecution under the other as double jeopardy. *Graveires v. United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489; *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500; *Sims v. Rives*, 66 App. D.C. 24, 84 F.2d 871, cert. denied, 298 U.S. 682, 56 S.Ct. 960, 80 L.Ed. 1402. In the latter case, quoting from *Morgan v. Devine*, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153, it was aptly said '* * * the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.' [66 App. D.C. 24, 84 F.2d 876].

In *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (Miss. 1941) the Supreme Court of Mississippi stated:

The driving of a vehicle by one who is under the influence of intoxicating liquor is a misdemeanor. § 49, Ch. 200, Laws 1938. The driving of an automobile while in this condition is therefore per se negligence. *Williams v. State*, 161 Miss. 406, 137 So. 106. But this does not mean that such evidence constitutes a prima facie case of manslaughter. (citations omitted) It must be kept in mind that appellant is here prosecuted not for driving while under the influence of intoxicating liquor but for culpable negligence. These are separate offenses for which one could be separately prosecuted and neither prosecution would bar the other. See *State v. Sisneros*, 42 N.M. 500, 82 P.2d 274; *People v. Townsend*, 214 Mich. 287, 783 N.W. 177, 16 A.L.R. 902,

8 R.C.L. 147; *Holland v. State*, 123 Fla. 142, 166 So. 468. In a prosecution for manslaughter referable to culpable negligence, intoxication could be a relevant evidential fact. Yet it is not as controlling that the defendant in manslaughter was violating the traffic laws as that he was in fact culpably negligent. One may be negligent while acting lawfully. *State v. Brewen*, 169 Iowa 256, 151 N.W. 102; *Commonwealth v. Amatucci*, 29 Del. Co. R., Pa., 160. One may violate the law and yet not be culpably negligent in fact. *Commonwealth v. Aurick*, 138 Pa. Super. 180, 10 A.2d 22; *People v. Warner*, 27 Cal. App. 2d 190, 80 P.2d 737; *Commonwealth v. Williams*, 133 Pa. Super. 104, 1 A.2d 812. It is sufficient in a prosecution for the misdemeanor that the defendant be driving while under the influence of liquor. No injury need be shown.

The Supreme Court of Iowa addressed the same issues as are now before this Court in a very similar case. Also in that case the United States Supreme Court refused to hear petitioner's appeal. That case was *State v. Stewart*, 223 N.W.2d 250 (1974), *cert. denied*, 423 U.S. 902, 96 S.Ct. 204, 46 L.Ed.2d 134. In that case the Court held that defendant's reckless driving conviction which arose out of the same occurrence was not a lesser included offense of manslaughter and former jeopardy did not bar defendant's conviction of manslaughter.

In *State v. Stewart, supra*, the Court stated:

There are two steps in determining whether one offense is included within another. The first is a consideration of the elements. The lesser offense must be composed solely of some but not all elements of the greater crime. *The lesser crime must not require any additional element which is not needed to constitute*

the greater crime. The lesser offense is therefore said to be necessarily included within the greater. [Emphasis Added].

It is only after the elements of the lesser crime are shown to be necessarily included in the greater crime that a second inquiry is made. The second inquiry is a factual one, undertaken on a case by case basis. . . . *the lesser crime (reckless driving) requires additional elements not needed to constitute the greater crime (manslaughter).* [Emphasis Added].

There are three elements to the crime of reckless driving under § 321-283, The Code. They are (1) the conscious and intentional operation of a motor vehicle (2) in a manner which creates an unreasonable risk or harm to others (3) where such risk is or should be known to the driver. *State v. Baker*, 203 N.W.2d 795, (796) (Iowa) and authorities.

Manslaughter under § 690-10, The Code, is the unlawful unintentional killing of a human being by another without malice express or implied. *State v. Boston*, 233 Iowa 1249, 1255, 11 N.W.2d 407, 410. We have no vehicular homicide statute in Iowa. But our cases acknowledge manslaughter can be committed by operating a motor vehicle in either of two ways. Manslaughter may result from the reckless operation of a motor vehicle. *State v. Wallin*, 195 N.W.2d 95, 99 (Iowa 1972); *State v. Means*, 211 N.W.2d 283 (Iowa 1973). It may result from operating a motor vehicle while intoxicated. *State v. Davis*, 196 N.W.2d 885, 890 (Iowa 1972).

However under either theory, proof of manslaughter requires proof of fact (resultant death) which the other (either reckless driving or driving while in-

toxicated) does not. See *State v. Cook*, *supra*, and *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309.

223 N.W.2d at 253:

We think that reckless driving and manslaughter are not the same for former jeopardy purposes. We approve the following:

'The offense of reckless driving is not the same in law or in fact as, nor is it a lesser degree of, the offense of manslaughter arising out of the operation of a motor vehicle, even though they may arise from the same occurrence or transaction, and consequently an acquittal or conviction of reckless driving will not be a bar to a prosecution for manslaughter arising out of the same facts. Nor will an acquittal or conviction of manslaughter serve as a bar to a prosecution for reckless driving arising out of the same facts does not bar a subsequent prosecution for causing the death of another by reckless driving, the offense not being the same.' 7 Am.Jur.2d, Automobiles and Highway Traffic, § 343, pages 889-890. See also 22 C.J.S. Criminal Law § 295(2), pages 771-772.

We conclude defendant is wrong in claiming reckless driving is a lesser included offense to manslaughter.

The District Court adopting the Magistrate's Report states that guidance of respondent's contention, that he is entitled to habeas relief on the ground that trial on the manslaughter charge after trial and conviction of the misdemeanors violated his rights under the Double Jeopardy Clause of the Fifth Amendment, may be found in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980). The Supreme Court in *Illinois v. Vitale*, held:

The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a reckless failure to reduce speed and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision.

Of course, any collision between two automobiles or between an automobile and a person involves a moving automobile and in that sense a 'failure' to slow sufficiently to avoid the accident. But such a 'failure' may not be reckless or even careless, if when the danger arose, slowing as much as reasonably possible would not alone have avoided the accident yet, reckless driving causing death might still be proved if, for example, a driver who had not been paying attention could have avoided the accident at the last second, had he been paying attention, by simply swerving his car. The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the Blockburger test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.* [Emphasis Added]. (65 L.Ed.2d at 237).

The Court in *State v. James*, 606 P.2d 1101 (N.M. App. 1979), found that the municipal court record did not show a plea of guilty or a trial to determine guilt or innocence on the traffic offense charge, the Court held

that such circumstances did not rise to the level of a conviction for purposes of double jeopardy. It was then further held:

We also reassert the jurisdictional exception to using a lesser included offense as a bar to prosecution of the greater offense. The exception was set forth in *State v. Goodson*, 54 N.M. 184, 217 P.2d 262, 263 (1950), where the court quoted the following language from 1 F. Wharton, Criminal Law § 394 (12th ed.):

'And a conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the lesser offense is included in the greater offense, and vice versa. But a former trial and acquittal or prosecution, unless the defendant could have been convicted on the same evidence in the former trial, of the offense charged in the subsequent trial. An acquittal or conviction for a minor offense included in a greater offense will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense.'

The exception was recognized in the specially concurring opinion of Justice Sosa in *State v. Tanton*, 88 N.M. 333, 337, 540 P.2d 813, 817 (1975):

I would hold that conviction bars prosecution of a greater offense, subject to one exception: If the court does not have jurisdiction to try the crime, double jeopardy cannot attach. Double jeopardy requires that a court have sufficient jurisdiction to try the charge.

The exception does not conflict with the United States Supreme Court decision in *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970). The *Waller*

decision stands for the proposition that two courts within a state—district and municipal—cannot each try a person for the same crime. However, the Supreme Court recognized the possible existence of exceptions to this rule. *Id.* at 395, n. 6, 90 S.Ct. 1184. In *Ashe v. Swenson*, 397 U.S. 436, 453, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Mr. Justice Brennan specified and elaborated upon several of the exceptions in his concurring opinion. He stated: 'Another exception would be necessary if no single court has jurisdiction of all the alleged crimes.' *Id.* at 453, n. 7, 90 S.Ct. at 1199, n. 7.

It is clear that the justice court in the case presently before this Court was acting pursuant to its authority to punish Respondent for his traffic infractions, but it is equally clear that it had no authority to prosecute for manslaughter. Consequently, under the jurisdictional exception the State's felony prosecution against Respondent was correct.

The Court in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) stated:

The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932):

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . [Emphasis Added].

In the recent case of *United States v. Cowart*, 595 F.2d 1023 (5 Cir. 1979), the same issue was addressed in this language:

This standard frequently has been referred to as the 'same evidence' test; however, the *Blockburger* test looks not to the evidence adduced at trial but focuses on the elements of the offense charged. *Brown v. Ohio*, 432 U.S. at 166, 97 S.Ct. at 2225 (*Blockburger* test emphasizes the elements of the two crimes); *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975) ('if each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.') *United States v. Dunbar*, 591 F.2d 1190, 1193 (5th Cir. 1979) ('Application of the [*Blockburger*] test focuses on the statutory elements of the offenses charged.') [Emphasis Added]. (595 F.2d at 1023).

Similarly, it was held in *Walker v. Loggins*, 608 F.2d 731 (9 Cir. 1979):

The application of this test focuses on the statutory elements of the offense charged, not the particular manner in which the offense was committed or described in the indictment. *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

An examination of statutory offenses here involved reveals that each contains elements not common to the other. The offenses of reckless driving, driving while license suspended or revoked, driving on wrong side of road, driving under the influence, are predicated upon

the manner of operation of a motor vehicle upon the streets or highways of this State and are in no manner dependent upon any resultant injury to persons or property. See *Barnes v. State*, 249 Miss. 482, 162 So.2d 865 (1964); *Gause v. State*, 203 Miss. 377, 34 So.2d 729 (1948); *Sanford v. State*, 195 Miss. 896, 16 So.2d 628 (1944). The crime of manslaughter by culpable negligence, by contrast, not only involves an unlawful homicide, but is not restricted as to either instrumentality or location. *Gandy v. State*, 373 So.2d 1042 (1979). See also: *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (1941). These offenses therefore are neither the same in law or fact.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Larry M. Wilson, a Special Attorney General for the State of Mississippi and one of the attorneys for the Petitioners, do hereby certify that I have this day served a true and correct copy of the foregoing Writ of Certiorari to the following counsel:

Cleve McDowell, Esq.
Attorney at Law
Post Office Box 1205
Cleveland, Mississippi 38732

This, the 7th day of February, 1983.

LARRY M. WILSON

A1

APPENDIX

EXHIBIT 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner

v.

MORRIS THIGPEN, ET AL,
Defendants

REPORT AND RECOMMENDATION

In this petition for a writ of habeas corpus, petitioner Barry Joe Roberts challenges the constitutionality of his May 15, 1978 manslaughter conviction in the Circuit Court of Tallahatchie County, pursuant to which he is presently incarcerated at the Mississippi State Penitentiary.

Petitioner's trial and conviction on the manslaughter charge resulted from a tragic collision on August 6, 1977 between an automobile driven by petitioner and a pickup truck, in which collision the ten-year-old daughter of the driver of the truck was killed. Shortly after the accident, petitioner was cited by a Mississippi Highway Patrolman for several misdemeanor offenses, viz., driving under the influence, driving on the wrong side of the road, driving with a suspended license, and reckless driving. On August

13, 1977, petitioner was tried and convicted of these charges by a Tallahatchie County Justice of the Peace; on the same date, petitioner appealed the convictions to the Circuit Court of Tallahatchie County pursuant to Miss. Code Ann. §99-35-1, where he was entitled to trial de novo, *id.* Before the misdemeanor charges were retried on appeal, petitioner was indicted by the Tallahatchie County Grand Jury for manslaughter of the child killed in the traffic collision. Trial of the appeal of the misdemeanors thereafter was consolidated with trial of the manslaughter charge, but the misdemeanor appeals were nolle prossed during the consolidated trial.

Petitioner claims that he is entitled to habeas relief on the ground that trial on the manslaughter charge after trial and conviction of the misdemeanors violated his rights under the Double Jeopardy Clause of the Fifth Amendment.¹ Guidance on this contention is found in *Illinois v. Vitale*, U.S., 65 L.Ed.2d 228 (1981). There, in a similar factual setting, the Supreme Court held that the Double Jeopardy Clause precludes prosecution for manslaughter by automobile when the defendant has been convicted of a misdemeanor based on the same conduct and where proof of the manslaughter charge necessarily entails proof of the misdemeanor charge.

As noted above, one of the misdemeanors of which petitioner was convicted was reckless driving. Miss. Code Ann. §63-3-1201 provides that "Any person who drives any vehicle in such a manner as to indicate a wilful or wanton disregard for safety of persons or property is guilty of

1. Petitioner also asserts claims for habeas relief based upon the trial court's certification of an improper special venire, and ineffective assistance of counsel. Because of the court's disposition of the petition on other grounds, it is unnecessary to address these claims.

reckless driving." Manslaughter is defined in general terms by Miss. Code Ann. §97-3-47 as "killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law . . ."; with regard to manslaughter by automobile, the Mississippi Supreme Court has construed the statute to explain that "the gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence, which must be wanton or reckless under circumstances implying danger to human life", *Smith v. State*, 20 So.2d 701, 704 (Miss. 1945), "that is to say, a wanton and flagrant recklessness and disregard of the safety of human life or limb . . .", *id.* at 706. It is thus apparent that manslaughter by automobile in violation of §97-3-47 cannot be proved without at the same time proving reckless driving in violation of §63-3-1201, and that the conduct of petitioner that constituted reckless driving — losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle — is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction. Therefore, under the Double Jeopardy Clause, the "conviction on [the] lesser included offense bars subsequent trial on the greater offense", *Illinois v. Vitale*, *supra*, 65 L.Ed.2d at 238, and petitioner is entitled to habeas relief on his double jeopardy claim.

Additionally, prosecution of petitioner on the manslaughter charge violated his right to due process of law under the Fourteenth Amendment. *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed.2d 628 (1974), established a per se rule that a criminal defendant's right to due process is violated by the state substituting a felony charge for a misdemeanor charge covering the same conduct after the defendant has been convicted of the misdemeanor and has exercised his right under state law to appeal and to

trial de novo. The facts of this case fall squarely within *Blackledge*, under which petitioner also is entitled to relief.

For the foregoing reasons, it is recommended that the petition be granted, that the challenged manslaughter conviction be set aside, and that respondent be ordered to release petitioner from custody forthwith.

Respectfully submitted, this 3rd day of November, 1981.

/s/ (Illegible)

United States Magistrate

EXHIBIT 2

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION
NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner

v.

MORRIS THIGPEN, ET AL,
Defendants

ORDER

Upon due consideration of the petition for a writ of habeas corpus filed herein, the response thereto, and the Report and Recommendation of the United States Magistrate entered herein on November 3, 1981, no objection thereto having been filed, the court finds that the petition is well taken and should be granted. It is therefore

ORDERED:

1. That the Report and Recommendation of the United States Magistrate is hereby adopted as the opinion of the court; and

2. That the petition for a writ of habeas corpus is hereby granted, that petitioner's May 15, 1978 manslaughter conviction in the Circuit Court of Tallahatchie County is hereby vacated, and that respondent shall forthwith release petitioner from custody.

This, 19th day of November, 1981.

/s/ L. T. Senter, Jr.

United States District Judge

EXHIBIT 3

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION
NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, et al.,
Defendants.

ORDER

On November 23, 1981, this court issued an order staying its November 19, 1981, grant of habeas corpus so that defendants' counsel might have the opportunity to file written objections to the report and recommendations of the magistrate filed November 3, 1981. After reviewing defendants' objections and the brief filed by petitioner in support of the magistrate's report and recommendations, the court is of the opinion that the facts of this case fall squarely within *Blackledge v. Perry*, 417 U.S. 21 (1974), and that the writ earlier granted should issue.

Accordingly, it is

ORDERED:

That the stay ordered on November 23, 1981, is hereby lifted.

This 18th day of January, 1982.

/s/ L. T. Senter, Jr.

United States District Judge

EXHIBIT 4

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 82-4067

BARRY JOE ROBERTS,
Petitioner-Appellee,

versus

**MORRIS THIGPEN, Commissioner, Mississippi
Department of Corrections, ET AL.,
Respondents-Appellants.**

**Appeal from the United States District Court
For the Northern District of Mississippi**

(NOVEMBER 16, 1982)

**Before RUBIN and JOHNSON, Circuit Judges, and
DAVIS,* District Judge.**

PER CURIAM:

This habeas corpus appeal comes before this Court in an unusual manner: it is the state, not the prisoner, that appeals. Roberts was tried and convicted in a Tallahatchie County Justice Court for the misdemeanor offense of reckless driving;¹ he was later convicted of manslaughter in the Circuit Court of Tallahatchie County. Roberts challenged his manslaughter conviction on the

*District Judge of the Western District of Louisiana, sitting by designation.

1. Roberts was also convicted of three other misdemeanor offenses: driving under the influence of intoxicating liquor, driving on the wrong side of the road, and driving with a suspended license.

grounds that he was twice put in jeopardy for the same offense. The federal district court held that Roberts was entitled to habeas corpus relief on either double jeopardy or due process grounds.² We agree with the district court that Roberts was twice put in jeopardy for the same offense and therefore affirm the granting of habeas corpus relief.

I

On August 6, 1977, at approximately 7:00 p.m., Roberts lost control of his car and collided with a pickup truck on Mississippi State Highway 35. The ten-year-old daughter of the driver of the pickup truck was killed. Roberts was tried and convicted by a Tallahatchie County Justice Court judge for the misdemeanor offense of reckless driving and three other misdemeanor offenses. Roberts' punishment was assessed at a fine of \$100.00 for the offense of reckless driving. He appealed his convictions to the Tallahatchie Circuit Court where he was entitled to trial de novo. Before he was retried for the misdemeanor charges on appeal, Roberts was indicted for the felony offense of manslaughter of the girl killed in the collision. The appeal of the misdemeanors was consolidated with the manslaughter trial, but the misdemeanor appeals were "nolle prossed."³ Roberts was convicted of manslaughter on May 15, 1978, after a trial by jury, and sentenced

2. The district court found that a violation of due process constituted an alternative basis for habeas corpus relief. In so finding, the court relied on *Blackledge v. Perry*, 94 S.Ct. 2098 (1974), for the proposition that the state may not substitute a felony charge for a misdemeanor charge which covers the same conduct after the defendant has been convicted of the misdemeanor and has exercised his right under state law to appeal and to trial de novo. Because we find Roberts' manslaughter conviction barred by the double jeopardy clause, we do not reach the *Blackledge* ground for the court's holding.

3. The prosecutor declared he would not prosecute.

to twenty years in the Mississippi Department of Corrections.

On March 13, 1981, Roberts filed a habeas corpus petition in federal district court. Roberts contended that he was put in double jeopardy in violation of the fifth amendment because the same proof was offered to sustain the conviction of involuntary manslaughter that had been offered to prove the misdemeanor charges. The district court's granting of habeas corpus relief on the double jeopardy claim was based on the Supreme Court's decision in *Illinois v. Vitale*, 100 S.Ct. 2260 (1980). The district court concluded that manslaughter by automobile cannot be proved without at the same time proving reckless driving, and consequently, reckless driving is a lesser included offense of manslaughter. The felony manslaughter trial and conviction was therefore held to be barred due to the prior misdemeanor conviction for reckless driving.

II.

A.

One of the guarantees of the constitutional prohibition of double jeopardy is protection against a second prosecution for the same offense after conviction.⁴ We must decide, therefore, whether the felony offense of manslaughter is the "same offense" for double jeopardy purposes as the misdemeanor offense of reckless driving.

In confronting this question, this Court is bound by the analytical framework of *Vitale*. The *Vitale* analysis is a two-pronged one. The first prong involves application

4. The other two guarantees are (1) protection against a second prosecution for the same offense after acquittal and (2) protection against multiple punishment for the same offense. *Illinois v. Vitale*, 100 S.Ct. 2260, 2264-65.

of the *Blockburger* test.⁵ The Supreme Court's application of the test focuses on the statutory elements of each offense. *Ianelli v. United States*, 95 S.Ct. 1284, 1293 n.17 (1975).

In this case the *Blockburger* test requires a close comparison of the Mississippi statute for reckless driving and the Mississippi manslaughter statute. Miss. Code Ann. § 63-3-1201 provides that "[a]ny person who drives any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving." Miss. Code Ann. § 97-3-47 defines manslaughter in general terms as the "killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law" To establish a violation of the reckless driving statute, one element not required to prove manslaughter must be established: operation of a motor vehicle. Of course, to establish manslaughter, an element not required to prove reckless driving must be shown: death of a person.

Brown v. Ohio, 97 S.Ct. 2221 (1977), and *Vitale* require a double checking of the analysis with a second question: does proof of the greater crime necessarily involve proof of the lesser crime? If, in proving manslaughter, the prosecutor has necessarily established reckless driving as well, double jeopardy will bar reprosecution.

A narrow focus on the two statutes provides one answer. Proof of manslaughter does not necessarily entail proof of reckless driving, for manslaughter could be proved

5. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Brown v. Ohio*, 97 S.Ct. 221, 225 (1977), citing *Blockburger v. United States*, 52 S.Ct. 180, 182 (1932).

in a situation completely foreign to a vehicular collision. The flaw in this analysis is that Mississippi has a case law veneer on its general manslaughter statute. Consequently, there is a definition, albeit not a statutory one, of the offense of vehicular homicide. The Mississippi Supreme Court has clearly defined the offense of manslaughter by automobile: "[T]he gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence which must be wanton or reckless under circumstances implying danger to human life." *Smith v. State*, 20 So.2d 701, 704 (Miss. 1945). By taking this judicial veneer into account, it is apparent that manslaughter by automobile cannot be proven without at the same time proving reckless driving. Because the specific felony offense, manslaughter by automobile, is not statutorily defined, this Court is confronted with a novel situation.⁶ Depending on whether the focus is on the manslaughter statute alone or on its case law veneer as well, application of the first prong of the *Vitale* analysis gives different results.

B.

It is unnecessary to resolve this dilemma on the first prong of the analysis.⁷ Roberts unquestionably has such

6. In prior cases the two offenses, in question have been specifically defined by distinct statutes. For example in *Illinois v. Vitale*, both the traffic offense of failure to reduce speed and the felony offense of involuntary manslaughter by motor vehicle were statutory. (Although Illinois did not have a separate statute for manslaughter by automobile, the latter offense was incorporated into the manslaughter statute by specific reference in Section b of Ill. Rev. Stat. 1973, ch. 38, § 9-3.) In *Brown v. Ohio*, two specific statutes were involved—joyriding and auto theft.

7. This Court recognizes that the normal order of analysis would entail discussion of the second prong only if resolution of the first prong resulted in a finding that reckless driving is not always an essential element of the crime of manslaughter.

a "substantial claim" of double jeopardy under the second prong that his trial and conviction for manslaughter are precluded.

The focus here is on the evidence actually presented at trial. If the state had to prove reckless driving or had to rely on conduct necessarily involving reckless driving in order to prove manslaughter, Roberts has a substantial claim of double jeopardy under the fifth and fourteenth amendments of the United States Constitution. The same evidence that led to Robert's conviction on the misdemeanor charge was also introduced in the manslaughter trial.⁸ The trial court's instructions to the jury⁹ leave

8. This evidence consisted largely of the testimony of the investigating highway patrol officer regarding the speed of the car, tire skid marks, and the positions of the automobile and the pickup truck. The same highway patrol officer was the principal law enforcement witness in both proceedings.

9. The following portion of the court's charge is instructive:

The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

(a) The deceased, BRENDA BONNER, was a living person; and

(b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a passenger with the vehicle operated by the Defendant, then you should find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of

(Continued on following page)

no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter.

III.

Because Roberts has a substantial double jeopardy claim under the Supreme Court's holding in *Illinois v. Vitale*, the district court's granting of habeas corpus relief must be affirmed.

AFFIRMED.

Footnote continued—

every other reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty.

Culpable negligence is, as used in these instructions, conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness.

No. 82-1330

Office - Supreme Court, U.S.

FILED

SEP 8 1983

ALEXANDER L. STEVENS

CLERK

In the Supreme Court of the United States

October Term, 1982

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed February 9, 1983
Certiorari Granted May 31, 1983

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

Number DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

vs.

MORRIS THIGPEN, COMMISSIONER MISSISSIPPI
DEPARTMENT OF CORRECTIONS EDDIE LUCAS,
WARDEN; MISSISSIPPI DEPARTMENT OF
CORRECTIONS,
Respondents.

DOCKET ENTRIES

Date	NR.	Proceedings
3-16-81	1	PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY.
3/23/81	83	Mag's Order allowing respondent 20 days w/in which to file answer to the petition in accordance with Rule 5, Governing §2254 Cases. It is further ordered that the clerk of ct shall serve by certified mail to the Atty. Gen a copy of the petition and order. Mailed copy of order and petition to State Atty Gen. at his usual mailing address.
4/23/81	84	ANSWER and return to petition for Writ of Habeas Corpus. (With attachments)

- 6/29/81 87 Mag's Order requiring respondent to file with the court all records relating to the misdemeanor convictions appeal of which was consolidated with petitioner's manslaughter trial, etc. w/in 14 days.
- 7/10/81 88 Supplement to Rule 5 Exhibits, from respondents.
- 7-16-81 94 Petitioner's Response to Respondents' Rule 5 Exhibit.
- 8/17/81 96 Mag's order requiring petitioner to supplement his petition to specify what evidence he contends was properly admitted on the misdemeanor appeals in question that was not otherwise admissible on the manslaughter charge against petitioner.
- 8/31/81 97 SUPPLEMENTAL Petition of Barry Joe Roberts.
- 10/ 1/81 100 Mag's Order directing respondent to file w/in 14 days a memo setting forth the reasons why petitioner should not be granted h.c. relief. etc.
- 10/13/81 101 MOTION for add'l time in which to file Memo. to show cause why petitioner should not be granted Habeas Relief.
- 10/15/81 104 Mag's Order extending time w/in which to file their responsive brief to Oct. 21, 1981.
- 11-4-81 105 MAG'S REPORT & RECOMMENDATION.
- 11/23/81 108 Court's Order (LTS) that the R&R of the U. S. Mag is adopted as the opinion of the

court; and that the petition for a writ of habeas corpus is granted, that petitioner's May 15, 1978 manslaughter conviction is VACATED, and that respondent shall forthwith release petitioner from custody. COB 23, Page 104 Notice of entry mailed to counsel. JS-6

- 11/25/81 109 COURT'S ORDER: ORDERED that the court's order of November 19, 1981 is hereby stayed pending the court's review of defts' objections, if any, which must be filed within fifteen days of this Order. COB 23, Page 105. Notice of entry mailed to counsel.
- 12/ 9/81 110 Respondent's Objection to Magistrate's R&R.
- 1/21/82 125 Court's Order (LTS,Jr.): That the stay ordered on November 23, 1981 is hereby lifted. COB 23, Page 144 Notice of entry mailed to counsel.
- 2/18/82 127 NOTICE OF APPEAL. Copy to 5th Circuit with certified copy of docket entries, and copy to counsel. Filing fee unpaid.
- 2/22/82 Filing Fee Paid R#7149 \$70.00.
- 2/24/82 Original Record mailed to 5th Circuit by Certified Mail. No transcript necessary. Certified copy of docket entries mailed to counsel of record along with copy of transmittal letter.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

NUMBER DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

vs.

MORRIS THIGPEN, COMMISSIONER MISSISSIPPI DE-
PARTMENT OF CORRECTIONS EDDIE LUCAS, WAR-
DEN; MISSISSIPPI DEPARTMENT OF CORRECTIONS,
Respondents.

**PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

ORAL ARGUMENT REQUESTED

EVIDENTIARY HEARING REQUESTED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI

No.

(To be filled
in by clerk)

BARRY JOE ROBERTS, PETITIONER

(Full name and prison number, if any) (Include name
under which you were convicted, if different.)

v.

MORRIS THIGPEN, COMMISSIONER MISSISSIPPI DE
PARTMENT OF CORRECTIONS EDDIE LUCAS, WAR-
DEN; MISSISSIPPI DEPARTMENT OF CORRECTIONS,
RESPONDENT

(Name of Warden, Superintendent, Jailor or other person
having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF
MISSISSIPPI, ADDITIONAL RESPONDENT

(If petitioner is attacking a judgment which imposed a
sentence to be served in the *future*, petitioner must fill in
the name of the state where the judgment was entered. If
petitioner has a sentence to be served in the *future* under
a federal judgment which he wishes to attack, he should
file a motion under 28 U.S.C. §2255, in the federal court
which entered the judgment.)

Instructions—Read Carefully

- (1) This petition must be legibly handwritten or type-
written, signed by the petitioner and sworn to before

a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

- (2) Additional pages should not be attached except as indicated in the body of this form. The petition may not include any arguments or citations of authorities. A separate brief or memorandum of authorities may be filed if desired.
- (3) Upon receipt of a filing fee of \$5.00 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts, you must file separate petitions as to each court.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction. You will be deemed to have waived all grounds not included.
- (7) When the petition is completed, the original and two copies must be mailed to the Clerk of the United States District Court, whose address is P. O. Box 727, Oxford, Mississippi 38655.
- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

1. Place of Confinement Mississippi Department of Corrections
2. Name and location of court which entered the judgment of conviction under attack First Judicial District of Tallahatchie County; Charleston, Mississippi
3. Date of judgment of conviction May 15, 1978
4. Length of sentence Twenty years
5. Nature of offense involved (all counts): Manslaughter
6. What was your plea? (Check one)
 - (a) Not guilty ☒
 - (b) Guilty ☐
 - (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

7. Kind of trial: (Check one) Jury ☒ Judge only ☐
8. Did you testify at the trial? Yes ☒ No ☐
9. Did you appeal from the judgment of conviction?
Yes ☒ No ☐
10. If you did appeal, answer the following:
 - (a) Court appealed to Mississippi Supreme Court
 - (b) Result Conviction affirmed
 - (c) Date of result 12-5-79 See Exhibit "1"
11. If you did not appeal, please explain briefly why you did not. N/A

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes ☒ No ☐
13. If your answer to 12 was "yes," give the following information:
- (a) (1) Name of court Mississippi Supreme Court
 - (2) Nature of proceedings Writ of Error Coram Nobis or in the Alternative Habeas Corpus
 - (3) Grounds raised:
 - A. Double Jeopardy
 - B. Court certified defective special venire.
 - C. Court allowed improper consolidations.
 - D. Lack of proper legal representation.
 - (4) Did you receive an evidentiary hearing on your petition, application or motion: Yes ☐ No ☒
 - (5) Result N/A
 - (6) Date of Result N/A
 - (7) If the result was against you, did you appeal? Yes ☐ No ☒
 - (8) If you did appeal, state the name of the court appealed to and the result of the appeal N/A
 - (9) If you did not appeal explain briefly why you did not appeal: Mississippi Supreme Court is highest State Court.

- (b) If you have filed more than one such petition, application or motion, give the same information as in (a) above for each such additional petition, application or motion. This information may be set out on a separate sheet attached to this petition and clearly labeled as a part of your answer to 13. N/A
14. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same. Such additional pages must be clearly labeled as a part of your answer to 14.

CAUTION In order to proceed in the federal court, you must first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date. You should carefully read again the instructions on page 1 before you complete the rest of this form.

GROUND 1. See Exhibit "2"

Supporting FACTS (tell your story *briefly* without citing cases of law):

The Trial Court erred in permitting the Petitioner to be indicted and tried upon a set of facts and circumstances which formed the basis for previous Justice Court charges for which the Petitioner had been tried, convicted, and sentenced.

Petitioner was tried and convicted of several misdemeanor charges which constituted a legal and factual bar to the further prosecution of the Petitioner.

Explain briefly the steps you have taken to present this ground to the state courts: Contained in the Writ application before Mississippi Supreme Court.

GROUND 2. See Exhibit "2"

Supporting **FACTS** (tell your story *briefly* without citing cases or law):

The Trial Court erred in vacating its order denying Appellant a special venire and in later during the trial declaring that a special venire had in fact been given and Petitioner's Trial Attorney was negligent in not objecting to same.

The Court certified a defective special venire. Explain briefly the steps you have taken to present this ground to the state courts: Contained in the Writ application before the Mississippi Supreme Court.

GROUND 3. See Exhibit "2"

Supporting **FACTS** (tell your story *briefly* without citing cases or law):

The Trial Court erred in permitting the State to consolidate the misdemeanor Appeals (Tallahatchie Circuit Court Numbers 4266, 4267, 4268 and 4269) and to receive evidence relating to same during Trial of the related Felony count (No. 4265) and Appellant's Trial Attorney was grossly negligent in not objecting to same.

Petitioner had several Justice Court sentences appealed along with his Trial for Manslaughter.

Explain briefly the steps you have taken to present this ground to the state courts: Contained in Petition before Mississippi Supreme Court.

GROUND 4. See Exhibit "2"

Supporting **FACTS** (tell your story *briefly* without citing cases or law):

The legal representation of the Petitioner at the Trial level and at the initial Appellate submission was grossly incompetent and prejudicially negligent and entitles the Petitioner to a new trial.

The Petitioner was not properly represented by counsel at the trial level. See Exhibit "3"

Explain briefly the steps you have taken to present this ground to the state courts: Contained in the Petition before the Mississippi Supreme Court.

15. If any of the grounds listed in 14 have not been presented in the state courts give your reasons for not presenting each such ground in the state courts: N/A
16. Do you have any petition or appeal now pending in any courts, either state or federal, as to the judgment under attack? Yes [] No [X]
17. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
 - (a) At preliminary hearing Hon. J.W. Kellum, Sumner, Mississippi
 - (b) At arraignment and plea Hon. J. W. Kellum, Sumner, Mississippi
 - (c) At trial Hon. J. W. Kellum, Sumner, Mississippi

- (d) At sentencing Hon. J. W. Kellum, Sumner, Mississippi
 - (e) On appeal Hon. J. W. Kellum, Sumner, Mississippi
 - (f) In any post-conviction proceeding Hon. Cleve McDowell, Post Office Box 1205; Cleveland, MS 38732
 - (g) On appeal from any adverse ruling in a post-conviction proceeding N/A
 - (h) At any parole or probation revocation proceedings N/A
18. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court at the same time? Yes [] No [X]
19. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes [] No [X]
- (a) If so, give name and location of court which imposed the sentence to be served in the future: N/A
 - (b) And give date and length of sentence to be served in the future N/A
 - (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes [] No [] N/A
20. What relief do you ask the Court to grant you?

Order the conviction set aside and Order a new trial.

Executed at Parchman, Mississippi on March 13, 1981.

/s/ Barry Joe Roberts
Signature of Petitioner

Subscribed and sworn to before me, this the 13th day
of March, 1981.

/s/ Mary Sandefer

Notary Public or other per-
son authorized to adminis-
ter an oath

My Commission Expires: Aug. 22, 1984.

/s/ Cleve McDowell

Signature of attorney, if any

FORMA PAUPERIS AFFIDAVIT

(See instructions at beginning of this form)

I hereby apply for leave to proceed with this petition
for writ of habeas corpus without prepayment of fees or
costs or giving security therefor. In support of my ap-
plication, I state under oath that the following facts are
true:

- (1) I am the petitioner in said petition, and I believe
that I am entitled to redress.
- (2) I am unable to prepay the costs of said action, or
give security therefor.
- (3) I have no assets or funds which could be used
to prepay the fees or costs except

.....
(Write "None" above if you have nothing; other-
wise, list your assets.

.....
Signature of Petitioner.

(Sign here *only* if you seek to
proceed without prepayment of
fees and costs.)

Subscribed and sworn to before me this day of
, 19.....

.....
 Notary Public or other person
 authorized to administer an
 oath.

My Commission Expires:

EXHIBIT "1"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 51,552

BARRY JOE ROBERTS,

v.

STATE OF MISSISSIPPI.

BEFORE ROBERTSON, LEE and BOWLING

LEE, JUSTICE, FOR THE COURT:

Barry Joe Roberts was convicted in the Circuit Court of Tallahatchie County of manslaughter by culpable negligence and was sentenced to twenty (20) years in the Mississippi State Penitentiary. He appeals and assigns two (2) errors in the trial below.

I.

Did the trial court err in overruling appellant's motion for a peremptory instruction of not guilty?

In passing on this question, the Court considers all evidence favorable to the State, together with reasonable

inferences flowing therefrom, and, if such evidence is sufficient to present a guilt question for the jury, the peremptory instruction should be refused. *Warn v. State*, 349 So. 2d 1055 (Miss. 1977).

On August 6, 1977, at approximately 7:00 p.m., Mrs. Mary Ella Bonner was driving her pickup truck in a southerly direction on Mississippi State Highway 35 between Charleston and Batesville. Two (2) other persons were riding in the cab of the truck with her, and five (5) children were riding in the bed of the truck. Appellant was driving an automobile in a northerly direction on said highway and, as the two vehicles approached each other, appellant's automobile ran off the east side of the highway, came back upon it and collided with the Bonner truck in the southbound lane of travel. Brenda Gail Bonner, ten-year-old daughter of Mrs. Mary Ella Bonner, sustained a broken neck in the collision and expired at the scene.

Mrs. Louise Goad, who operated a store which dispensed alcoholic beverages, testified that, at approximately 5:30 p.m. on the date of the accident, appellant purchased beer for himself and a companion and also a six-pack of beer to carry with them. She observed that appellant had been drinking excessively at that time.

Mr. E. J. Dungan, a former law enforcement officer, saw appellant at approximately 6:45 p.m. on said day, driving north on Highway 35 at a high rate of speed, which he estimated at ninety (90) miles per hour. He went to the scene of the accident, observed the position of the cars and debris, and that appellant's eyes were red. However, he did not testify that appellant was intoxicated.

Reverend W. T. Barkley and Margaret Barkley, his wife, were proceeding south on Highway 35 directly behind

Mrs. Bonner's truck before, and at the time of, the collision. He said that appellant's car ran off the highway, turned sideways, came back upon it, turned sideways again, and collided with the Bonner truck in the southbound lane. He walked over to appellant's car and "It smelled like it was a beer truck wreck rather than a car." Mrs. Barkley corroborated her husband as to the details of the collision.

Mrs. Mary Ella Bonner testified that, as she was driving her truck south upon the highway, she saw appellant's car approaching at an extremely high rate of speed, the car left the highway, swerved back upon it, went into a spin, and collided with her truck in the southbound lane of travel.

Thomas McLeod, Mississippi State Highway patrolman, went to the scene for the purpose of investigating the collision. He detected the odor of alcohol on appellant, who was unstable in his walking, was glassy-eyed and appeared to be under the influence of alcohol. Officer McLeod asked him what he was drinking, and appellant replied, "Well, I have been drinking beer all afternoon." McLeod was of the opinion that appellant's ability to operate a motor vehicle was impaired as a result of intoxication.

Appellant testified that he leaned over to pick up a tape for his tape player, which had fallen to the floorboard, and, in doing so, lost control of the vehicle, which resulted in the collision.

Culpable negligence, as defined by the Court, is negligence that is so gross and wanton as to evidence an utter disregard for the safety of human life. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701 (1945).

The fact that a person is intoxicated may be shown as a contributing factor to the collision. In the present

case, it was the jury's prerogative to determine whether or not appellant's condition from drinking alcoholic beverages contributed to the tragedy, particularly since the highway patrolman testified that, in his opinion, appellant's driving ability was impaired by alcohol. Under the facts of this case, there was a question for the jury as to whether or not appellant's conduct was so gross and wanton as to come within the culpable negligence rule stated above.

II.

Did the trial court err in granting the State's Instructions S-1 and S-2?

The instructions offensive to the appellant follow:

"S-1

The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

(a) The deceased, BRENDA BONNER, was a living person; and

(b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N, while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a passenger with the vehicle

operated by the Defendant, then you shall find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty."

"S-2

Culpable negligence is, as used in these instructions, conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness."

Appellant relies upon *Cutshall v. State*, 191 Miss. 764, 4 So. 2d 289 (1941), as authority that the instructions constitute error. An instruction on intoxication was given in *Cutshall* and condemned as error. The instruction stated:

"The Court charges the jury for the State that it is a violation of the criminal laws of the State of Mississippi for a person to operate a motor vehicle on a public highway while under the influence of intoxicating liquor; and if you believe from the evidence in this case beyond a reasonable doubt that the defendant, Floyd Cutshall, unlawfully operated the pickup truck on public highway number 72 at a time when he was under the influence of intoxicating liquor, and in a manner constituting culpable negligence as defined in State instruction number 2, and that as a proximate result thereof Spangler Gregson was killed, then it is your sworn duty to find the defendant guilty as charged.'" 191 Miss. at 770, 4 So. 2d at 291.

The error in the above instruction resulted from the fact that the court told the jury it could return a guilty verdict of manslaughter by culpable negligence if Cutshall was guilty of driving while under the influence of intoxicating liquors. As stated in *Cutshall*, a person may violate a traffic law and still not be culpably negligent and guilty of manslaughter, and, on the other hand, even though one does not violate the law yet he may be culpably negligent and guilty of the crime.

The Instruction S-1 differs from that condemned in *Cutshall*. Instruction S-1 (which placed a higher burden upon the State by requiring it to prove appellant's guilt to the exclusion of every other reasonable hypothesis) submitted to the jury the question of whether or not appellant was guilty of gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner while under the influence of alcoholic beverages. The Instruction S-2 defined "culpable negligence" and was a proper statement of the law. *Cutchens v. State*, 310 So. 2d 273 (Miss. 1975). Also, the appellant requested and was granted an instruction which was similar to S-2 in defining culpable negligence, and was similar to S-1(b) in the definition of culpable negligence.

We are of the opinion that no error resulted in the granting of said instructions and that the judgment of the lower court should be affirmed.

AFFIRMED.

**PATTERSON, C.J., SMITH, P.J., ROBERTSON, P.J.,
SUGG, WALKER, BROOM, BOWLING and COFER, JJ.,
CONCUR.**

EXHIBIT "2"

**IN THE SUPREME COURT OF THE STATE
OF MISSISSIPPI**

MISC. NO.

BARRY JOE ROBERTS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

**MOTION FOR LEAVE TO FILE APPLICATION FOR
WRIT OF ERROR CORAM NOBIS OR IN THE AL-
TERNATIVE FOR WRIT OF HABEAUS CORPUS**

COMES NOW, the Petitioner, BARRY JOE ROBERTS, by and through Attorney, Cleve McDowell, and respectfully moves this Court pursuant to the provisions of Section 99-35-145 of the Mississippi Code of 1972, as Amended, and Rule 38 of the Rules of the Supreme Court of Mississippi, to grant this his petition for leave to file an application for a writ of error coram nobis in the Circuit Court of Tallahatchie County, Mississippi, or in the alternative, entertain a Writ of Habeaus Corpus in Petitioner's behalf; in support of which, of Petitioner would show the following:

I.

"THE TRIAL COURT ERRED IN PERMITTING THE PETITIONER TO BE INDICTED AND TRIED UPON A SET OF FACTS AND CIRCUMSTANCES WHICH FORMED THE BASIS FOR PREVIOUS JUSTICE COURT CHARGES FOR WHICH THE PETITIONER HAD BEEN TRIED, CONVICTED, AND SENTENCED."

II.

"THE TRIAL COURT ERRED IN VACATING ITS ORDER DENYING APPELLANT A SPECIAL VENIRE AND IN LATER DURING THE TRIAL DECLARING THAT A SPECIAL VENIRE HAD IN FACT BEEN GIVEN AND PETITIONER'S TRIAL ATTORNEY WAS NEGLIGENT IN NOT OBJECTING TO SAME."

III.

"THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CONSOLIDATE THE MISDEMEANOR APPEALS (TALLAHATCHIE CIRCUIT COURT NUMBERS 4266, 4267, 4268, and 4269) AND TO RECEIVE EVIDENCE RELATING TO SAME DURING TRIAL OF THE RELATED FELONY COUNT (NO. 4265) AND APPELLANT'S TRIAL ATTORNEY WAS GROSSLY NEGLIGENT IN NOT OBJECTING TO SAME."

IV.

"THE LEGAL REPRESENTATION OF THE PETITIONER AT THE TRIAL LEVEL AND AT THE INITIAL APPELLATE SUBMISSION WAS GROSSLY INCOMPETENT AND PREJUDICIALLY NEGLIGENT AND ENTITLES THE PETITIONER TO A NEW TRIAL."

V.

Accordingly, the Petitioner contends and would show that he is at present illegally confined in violation of the criminal laws of the State of Mississippi and of the United States of America; in violation of his rights under the Constitutions of the United States and the State of Mississippi as well as the laws thereunder applicable; specifically, the course of conduct pursued by the State of Mis-

Mississippi is violative of the following rights owing Petitioner:

1. The right to the due process of law under the Fourteenth Amendment of the Constitution of the United States of America;

2. The right to the equal protection of the laws as embodied in the Fourteenth Amendment of the United States Constitution;

3. The correlative right to the due process of law contained in Article 3, Section 14 of the Mississippi Constitution (1890);

4. The right to the due course of law as granted by Article 3, Section 24 of the Mississippi Constitution (1890).

WHEREFORE, premises considered, the Petitioner respectfully requests that leave to file an application for a Writ of Error Coram Nobis be granted the Petitioner or in the alternative entertain a Writ of Habeas Corpus in Petitioner's behalf.

EXHIBIT "2a"

IN THE
CIRCUIT COURT OF TALLAHATCHIE COUNTY,
MISSISSIPPI

NUMBER 51,552

BARRY JOE ROBERTS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

**PETITION FOR WRIT OF ERROR CORAM NOBIS
OR IN THE ALTERNATIVE FOR WRIT OF
HABEAUS CORPUS**

ORAL ARGUMENT REQUESTED

COMES NOW, the Petitioner, BARRY JOE ROBERTS, by and through his Attorney, Cleve McDowell, and respectfully moves this court pursuant to the provisions of Section 99-35-145 of the Mississippi Code of 1972, as amended, to grant this his petition for a writ of error coram nobis or in the alternative, entertain a writ of habeaus corpus Petitioner's behalf; in support of which, the Petitioner would show the following:

I.

In the afternoon of August 6, 1977, at approximately 6:00 p.m., the Petitioner, BARRY JOE ROBERTS, was the driver of a vehicle on Mississippi Highway 35 between Charleston and Batesville. The Petitioner had one pas-

senger with him. While attempting to recover a fallen tape, appellant lost control of his vehicle and was involved in a collision wherein a ten year old child riding on the back of a truck was fatally injured. Barry Joe Roberts, under Section 97-3-47, Mississippi Code, 1972 Annotated, was indicted, tried and convicted in the Circuit Court of the First Judicial District of Tallahatchie County at the May, 1978, Term, for manslaughter, because of the death of the child in the truck collision, which allegedly was the result of culpable negligence on the part of the Petitioner. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. The Mississippi Supreme Court has affirmed said conviction. The facts contained in this paragraph are within the personal knowledge of Petitioner, BARRY JOE ROBERTS and are contained in the Trial transcript of said cause now on file with the Mississippi Supreme Court.

II.

"THE TRIAL COURT ERRED IN PERMITTING THE PETITIONER TO BE INDICTED AND TRIED UPON A SET OF FACTS AND CIRCUMSTANCES WHICH FORMED THE BASIS FOR PREVIOUS JUSTICE COURT CHARGES FOR WHICH THE PETITIONER HAD BEEN TRIED, CONVICTED, AND SENTENCED."

On August 13, 1977, Petitioner was tried in Beat one of the Justice Court System of Tallahatchie County, Mississippi, on the specific misdemeanor charges of wreckless driving, driving while license revoked or suspended, driving under the influence. Said charges constituted causes numbers 4266, 4267, 4268 and 4269, respectively, in the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, when they were appealed therein. Appellant was convicted in said Justice Court

and received the following sentences: pay a fine of One Hundred Dollars (\$100.00); pay a fine of One Hundred Dollars (\$100.00) and six (6) months in the County Jail; pay a fine of One Thousand (\$1000.00) and eleven (11) months in the County Jail, respectively. The facts and circumstances upon which the charges were tried in said Justice Court and the facts and circumstances which formed the basis of the subject indictment are the same. The convictions of the Petitioner on the charges in causes numbers 4266, 4267, 4268, and 4269 in said Justice Court constituted a legal and factual bar to the prosecution of the Petitioner on the indictment herein. The prosecution of the Petitioner on the Fifth Amendment to the United States Constitution and Article 3, Section 22, of the Constitution of the State of Mississippi. The facts contained in this paragraph are within the personal knowledge of Petitioner, BARRY JOE ROBERTS.

III.

"THE TRIAL COURT ERRED IN VACATING ITS ORDER DENYING APPELLANT A SPECIAL VENIRE AND IN LATER DURING THE TRIAL DECLARING THAT A SPECIAL VENIRE HAD IN FACT BEEN GIVEN AND PETITIONER'S TRIAL ATTORNEY WAS NEGLIGENT IN NOT OBJECTING TO SAME."

The Petitioner requested in a pretrial motion that a special venire be granted and that request was denied by the Trial Judge that they were running short of jurors and the Trial Judge said that he either pulled some names out of a box or told the clerk to do so. The trial Judge later in the trial ruled that a Special Venire had in fact been granted. It is urged that the trial court erred in this determination in as much as the requirements for a

special venire are set forth in the statutes and further require that the Petitioner and his attorney be present at the drawing of such. In this instance, neither the Petitioner or his attorney were present. It is further urged that Petitioner was prejudiced by same. The facts contained in this paragraph are within the personal knowledge of Petitioner, BARRY JOE ROBERTS and are contained in the trial transcript of said cause now on file with the Mississippi Supreme Court.

IV.

"THE TRIAL COURT ERRED IN PERMITTING THE STATE OF CONSOLIDATE THE MISDEMEANOR APPEALS (TALLAHATCHIE CIRCUIT COURT NUMBERS 4266, 4267, 4268 and 4269) AND TO RECEIVE EVIDENCE RELATING TO SAME DURING TRIAL OF THE RELATED FELONY COUNT (NO. 4265) AND APPELLANT'S TRIAL ATTORNEY WAS GROSSLY NEGLIGENT IN NOT OBJECTING TO SAME."

Prior to the beginning of the felony indictment in the Circuit Court, the Petitioner had been convicted in the justice court on four separate lesser offenses which were appealed to the circuit court of Tallahatchie County. The Trial Court consolidated the cases on appeal from the justice court and tried the felony indictment along with the appeals. It is urged that the above actions by the Trial Court, the State and the trial defense attorney were in error. The facts cited in this paragraph are within the personal knowledge of the Petitioner, BARRY JOE ROBERTS, and are contained in the Trial transcript now on file with the Mississippi Supreme Court.

V.

"THE LEGAL REPRESENTATION OF THE PETITIONER AT THE TRIAL LEVEL AND AT THE INITIAL APPELLATE SUBMISSION WAS GROSSLY INCOMPETENT AND PREJUDICIALLY NEGLIGENT AND ENTITLES THE PETITIONER TO A NEW TRIAL."

It is urged that the naturally inflammatory nature of the death of a young child in a sparsely populated rural county where many residents are either relatives or friends of each other, it was basic and necessary for the proper defense of the Petitioner that a change of venue be sought in Petitioner's behalf. Indeed, in the instant case, relatives of the deceased child served on the grand jury which indicted the Petitioner according to the grand jury records. These facts are supported by affidavits and a certified copy the Grand Jury list in question from the Circuit Clerk of Tallahatchie County, Mississippi, which are attached as "Exhibits 1", 2", and "3". Facts are not before this court which show that such request would have been granted, however, the failure of the Petitioner's trial attorney to request such a change, when seen with other matters relating to this case, is clearly indicative of the fact that the Petitioner was never given the opportunity to have evidence presented to the trial court to be considered on this issue and the failure of such a review was possible prejudicially injurious to the case of the Petitioner. The facts contained in this paragraph are within the personal knowledge of the Petitioner, Barry Joe Roberts and with the personal knowledge of those Affiants whose affidavits are attached as "Exhibits 4" through "27".

Further, the Petitioner, BARRY JOE ROBERTS, and members of his immediate family were misled by the

advice of Petitioner's trial counsel in that they were advised by said counsel that the trial site could not be moved from where it was held as a matter of law and that it was therefore unnecessary to request a change of venue in said cause. It is therefore urged that this mistaken advice of counsel influenced the Petitioner's major decision relating to the conduct of his defense such as whether or not he should plea bargain and it is accordingly argued that said Petition for Error Coram Nobis is appropriate. These allegations are supported by affidavits from Affiants attached as "Exhibits 28, 29 and 30" and by the personal knowledge of the Petitioner, BARRY JOE ROBERTS.

VI.

Accordingly, the Petitioner contends and would show that he is at present illegally confined in violation of the criminal laws of the State of Mississippi and of the United States of America; in violation of his rights under the Constitutions of the United States and the State of Mississippi as well as the laws thereunder applicable; specifically, the course of conduct pursued by the State of Mississippi is violative of the following rights owing Petitioner:

1. The right to the due process law under the Fourteenth Amendment to the Constitution of the United States of America;
2. The right to the equal protection of the laws as embodied in the Fourteenth Amendment of the United States Constitution;
3. The correlative right to the due process of law contained in Article 3, Section 14 of the Mississippi Constitution (1890);

4. The right to the due course of law as granted by Article 3, Section 24, of the Mississippi Constitution (1890).

WHEREFORE, premises considered, the Petitioner respectfully requests that a Writ of Error Coram Nobis be granted the Petitioner's behalf, and that often a hearing thereof, Petitioner be granted a new trial or discharged.

STATE OF MISSISSIPPI
COUNTY OF SUNFLOWER

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named, BARRY JOE ROBERTS, Petitioner, who stated on oath that the matters and facts set out in the foregoing Petition are true and correct and that those stated on information and belief are verily believed by him to be true as therein stated.

/s/ Barry Joe Roberts
Barry Joe Roberts

SWORN TO AND SUBSCRIBED before me, on this, the 2nd day of November, 1980.

/s/ Gennette McDowell
Notary Public

(Seal)

My Commission Expires: 4/9/84

CERTIFICATE

I, Cleve McDowell, Attorney at Law, hereby certify that I am the attorney of record in the above styled and numbered buse and further that it is my opinion that said application for Writ of Error Coram Nobis has Merit.

This the 2nd day of November, 1980.

/s/ Cleve McDowell
Cleve McDowell

SWORN TO AND SUBSCRIBED before me, a notary public, this the 2nd day of November, 1980.

/s/ Gennette McDowell
Notary Public

(Seal)

My Commission Expires: 4/9/84

CERTIFICATE

I, Cleve McDowell, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing Petition for Writ of Error Coram Nobis or in the Alternative for Writ of Habeaus Corpus to the Honorable Bill Allain, Attorney General of the State of Mississippi, at his usual business of Post Office Box 220, Jackson, Mississippi 39205.

This, the 2nd day of November, 1980.

/s/ Cleve McDowell
Cleve McDowell

"EXHIBIT 1"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, George Stokes, an adult Citizen of Tallahatchie County, Mississippi, whose address is Charleston, Miss. 38921, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that George Stokes, is and was a relative of the deceased child in question, also served on the same Grand Jury with me.

/s/ George Stokes
Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Sandra Brett Johnson
Notary Public

(Seal)

My Commission Expires: Jan. 1984

"EXHIBIT 2"

STATE OF MISSISSIPPI)
)
 COUNTY OF SUNFLOWER)

AFFIDAVIT

I, H. D. ROBERTS, an adult Citizen of Tallahatchie County, Mississippi, father of BARRY JOE ROBERTS, on or about September 30, 1980, was told by NICK P. SHERMAN, foreman of the Grand Jury which indicted my son, that "He was the first on the scene of the accident and that he was angry that he was not called by the prosecution as a witness."

Dated: October 5, 1980.

/s/ H. D. Roberts
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 5th day of October, 1980.

/s/ Gennette McDowell
 Notary Public

(Seal)

My Commission Expires: 4/9/84

"EXHIBIT 3"

Tallahatchie Co., Ms.
1st District

Grand Jury Dec. 1977

NAMES AND ADDRESSES OF THE GRAND JURY

NICK P. SHERMAN - Route 1 Enid, Ms. 38927

OLIVER WILLIAMS - P. O. BOX 352 Charleston, Ms. 38921

CHARLES E. JOHNSON - 709 North Sarah St. Charleston,
Ms. 38921

(Dead) BESSIE R. HOLLAND - Route 1 Box 88 Tillatoba,
Ms. 38961

WILLIAM EDWARD HOLLAND - Tillatoba, Ms. 38961

GEORGE STOKES, JR. - Route 1 Enid, Ms. 38927

CHARLES D. ORR - 209 N. Franklin Charleston, Ms. 38921

JESSIE RAY HARDY - Tippo, Ms. 38962

LARRY J. HILLHOUSE - 207 Sabine St. Charleston, Ms.
38921

JUDY P. SHAW - Route 2 Box 335 Holcomb, Ms. 38940

Emanuel L. Owen - 101 Franklin Charleston, Ms. 38921

Lucille J. Roberson - Route 1 Highway 32E Charleston,
Ms. 38921

MILDRED L. ROWE - P. O. Box 99 Charleston, Ms. 38921

CORA B. BLAND • 806 North Sarah Street or P. O. Box
331 Charleston, Ms. 38921

GLADYS DAWSON - 321 So. Holly St. Charleston, Ms.
38921

BETTY B. SWEARENGEN - Philipp, Ms. 38950

RICHARD L. GARDNER - 199 Depot St. Charleston, Ms.
38921

"EXHIBIT 4"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, George Stokes, an adult Citizen of Tallahatchie County, Mississippi, whose address is Charleston, Miss. 38921, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ George Stokes
Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Sandra Brett Johnson
Notary Public

(Seal)

My Commission Expires: Jan. 1984

"EXHIBIT 5"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, Emanuel L Owen, an adult Citizen of Tallahatchie County, Mississippi, whose address is 207 N Pleasant Charleston Ms., first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ Emanuel L Owen
Affiant

SWORN to and subscribed before me, a Notary Public, this the 30th day of Sept., 1980.

/s/ Paul Eastridge
Notary Public
by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 6"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, Gladys Dawson, an adult Citizen of Tallahatchie County, Mississippi, whose address is 321 Holly St. Charleston, Miss. 38921, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ Gladys Dawson
Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul J. Eastridge
Notary Public

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 7"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, Richard L. Gardner, an adult Citizen of Tallahatchie County, Mississippi, whose address is 199 Depot St. Charleston, Ms. 38921, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ Richard L. Gardner
Affiant

SWORN to and subscribed before me, a Notary Public, this the 9th day of October, 1980.

/s/ Nick Denly
Notary Public

(Seal)

My Commission Expires: January 1, 1984

"EXHIBIT 8"

STATE OF MISSISSIPPI
COUNTY OF TALLAHATCHIE

AFFIDAVIT

I, Charles Johnson, an adult Citizen of Tallahatchie County, Mississippi, whose address is 709 North Sarah St. Charleston Ms., first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ Charles Johnson
Affiant

SWORN to and subscribed before me, a Notary Public, this the 18th day of October, 1980.

/s/ Robert C. Kegl
Notary Public

(Seal)

My Commission Expires: 3-5-83

"EXHIBIT 9"

STATE OF MISSISSIPPI
COUNTY OF Tallahatchie

AFFIDAVIT

I, W. E. Holland Jr., an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt 1, Box 88, Tillatoba, Ms. 38961, first being sworn, hereby state that I was a member of the Grand Jury of Tallahatchie County, Mississippi, which indicted BARRY JOE ROBERTS for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that I did not understand the charges and penalties for the alleged crime at the time I voted and had I so understood the matter, my vote could have been different.

/s/ W. E. Holland Jr.
Affiant

SWORN to and subscribed before me, a Notary Public, this the 13 day of Oct., 1980.

/s/ (Illegible)
Notary Public

(Seal)

My Commission Expires: March 18, 1981

"EXHIBIT 10"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Fred D. Dungan, an adult Citizen of Tallahatchie County, Mississippi, whose address is Route 1, Charleston, Mississippi, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Fred D. Dungan
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 15th day of October, 1980.

/s/ (Illegible)
 Notary Public

(Seal)

My Commission Expires: 10-2-83

"EXHIBIT 11"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Verna Mae Irwin, an adult Citizen of Tallahatchie County, Mississippi, whose address is 705 N. Marshall, Charleston, Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from a automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Verna Mae Irwin
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 12"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Herman Irwin, an adult Citizen of Tallahatchie County, Mississippi, whose address is 705 N. Marshall, Charleston, Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Herman Irwin
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 13"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Ann H. Wrenn, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. #1 Enid, Miss. 38927, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Ann H. Wrenn
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 29th day of September, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 14"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, W. D. Wrenn, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. #1 Enid, Miss. 38927, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ W. D. Wrenn
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 29th day of September, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 15"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Tommy Young, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. # 1, Charleston, Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Tommy Young
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 16"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Lizzie Bess Young, an adult Citizen of Tallahatchie County, Mississippi, whose address is Route 1, Charleston, Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Lizzie Bess Young
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 17"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, C. T. Shaw, an adult Citizen of Tallahatchie County, Mississippi, whose address is Route 1, Charleston, Ms. 38921, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ C. T. Shaw
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 1st day of October, 1980.

/s/ Nick Denley
 Notary Public

(Seal)

My Commission Expires: January 1, 1984

"EXHIBIT 18"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Beatrice Nelson, an adult Citizen of Tallahatchie County, Mississippi, whose address is Charleston, Miss., R. 1, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Beatrice Nelson
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 19"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, George D. Allen, an adult Citizen of Tallahatchie County, Mississippi, whose address is P.O. Bx 402, Charleston, Ms. 38921, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ George D. Allen
 Affiant

SWORN to and subscribed before me, a Notary Public this the 5th day of October, 1980.

/s/ (Illegible)
 Notary Public

(Seal)

My Commission Expires: January 1, 1984

"EXHIBIT 20"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Maifred Allen, an adult Citizen of Tallahatchie County, Mississippi, whose address is, Oakland, Rt. 2 38948, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Maifred Allen
 Affiant

SWORN to and subscribed before me, a Notary Public this the 3rd day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 21"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Juanita L. Allen, an adult Citizen of Tallahatchie County, Mississippi, whose address is Charleston Miss., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Juanita L. Allen
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 22"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, William Earl Douglas, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. 2 Oakland, Ms., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been elsewhere.

/s/ William Earl Douglas
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 2nd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 23"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Charles B. Shankle, an adult Citizen of Tallahatchie County, Mississippi, whose address is P.O. Box 12 Charleston, Ms 38921, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Charles B. Shankle
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of Oct., 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 24"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Jim Newton, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. 1 Box 323, Charleston, MS 38921, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Jim Newton
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of October, 1980.

/s/ Paul Eastridge
 Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 25"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, J W Kuykendall Jr, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt 2 Box 96, Oakland, Ms., first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ J W Kuykendall Jr
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 2nd day of October, 1980.

/s/ Paul O Eastridge
 Notary Public

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 26"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, Rosa E. Kuykendall, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt 2, Box 96, Oakland, Miss, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ Rosa E. Kuykendall
Affiant

SWORN to and subscribed before me, a Notary Public, this the 2nd day of October, 1980.

/s/ Paul Eastridge
 Notary Public
 by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 27"

STATE OF MISSISSIPPI)
)
 COUNTY OF TALLAHATCHIE)

AFFIDAVIT

I, J W Kuykendall, Sr., an adult Citizen of Tallahatchie County, Mississippi, whose address is Oakland, MS. R-2, first being sworn, hereby state that I am now and was a Citizen of Tallahatchie County, Mississippi, at the time BARRY JOE ROBERTS was indicted and tried for the death of a child resulting from an automobile accident on August 6, 1977.

I further represent that the feelings and generally hostile attitude of the general public against ROBERTS in that Judicial District was such that BARRY JOE ROBERTS could not have gotten a fair trial, in my opinion, and further that the trial should have been held elsewhere.

/s/ J W Kuykendall
 Affiant

SWORN to and subscribed before me, a Notary Public, this the 2nd day of October, 1980.

/s/ Paul O Eastridge
 Notary Public

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 28"

STATE OF MISSISSIPPI
COUNTY OF TALLAHATCHIE

AFFIDAVIT

I, Sadie Roberts, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. 1 Charleston Ms., first being sworn, hereby state that I am the Mother of BARRY JOE ROBERTS and that prior to and during the trial of BARRY JOE ROBERTS for manslaughter in Tallahatchie County, Mississippi, I was told by Mr. J.W. Kellum, Attorney for BARRY JOE ROBERTS, that his trial could not be moved from where it was held (Charleston, Mississippi) and that there was no need to request a change of venue.

/s/ Sadie L. Roberts
Affiant

SWORN to an subscribed before me, a Notary Public,
this the 2nd day of October, 1980.

/s/ Paul Eastridge
Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 29"

STATE OF MISSISSIPPI

COUNTY OF TALLAHATCHIE

AFFIDAVIT

I, Mona Roberts, an adult Citizen of Tallahatchie County, Mississippi, whose address is Rt. 1, Charleston, Miss., first being sworn, hereby state that I am the wife of BARRY JOE ROBERTS and that prior to and during the trial of BARRY JOE ROBERTS for manslaughter in Tallahatchie County, Mississippi, I was told by Mr. J.W. Kellum, Attorney for BARRY JOE ROBERTS, that his trial could not be moved from where it was held (Charleston, Mississippi) and that there was no need to request a change of venue.

/s/ Mona Roberts
Affiant

SWORN to and subscribed before me, a Notary Public, this the 3rd day of October, 1980.

/s/ Paul Eastridge
Notary Public

by /s/ Debra Savage, D.C.

(Seal)

My Commission Expires: 1-2-84

"EXHIBIT 30"

STATE OF MISSISSIPPI
COUNTY OF PANOLA

AFFIDAVIT

I, Mrs. Carrie M. Doty, an adult Citizen of Panola County, Mississippi, whose address is Rt. 2, Bates, Miss. 38606, first being sworn, hereby state that I am the Mother in Law of BARRY JOE ROBERTS and that prior to and during the trial of BARRY JOE ROBERTS for manslaughter in Tallahatchie County, Mississippi, I was told by Mr. J.W.Kellum, Attorney for BARRY JOE ROBERTS, that his trial could not be moved from where it was held (Charleston, Mississippi) and that there was no need to request a change of venue.

/s/ Mrs. Carrie M. Doty
Affiant

SWORN to and subscribed before me, a Notary Public,
this the 3 day of October, 1980.

/s/ Robert L. Carter
Circuit Clerk

By /s/ Louise R. Davis, D.C.

(Seal)

My Commission Expires: 1-2-1984

IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI

Misc. No.

BARRY JOE ROBERTS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

**MOTION FOR LEAVE TO FILE APPLICATION FOR
WRIT OF ERROR CORAM NOBIS OR IN THE AL-
TERNATIVE FOR WRIT OF HABEAUS CORPUS**

COMES NOW, the Petitioner, BARRY JOE ROBERTS, by and through Attorney, Cleve McDowell, and respectfully moves this Court pursuant to the provisions of Section 99-35-145 of the Mississippi Code of 1972, as Amended, and Rule 38 of the Rules of the Supreme Court of Mississippi, to grant this his petition for leave to file an application for a writ of error coram nobis in the Circuit Court of Tallahatchie County, Mississippi, or in the alternative, entertain a Writ of Habeaus Corpus in Petitioner's behalf; in support of which, of Petitioner would show the following:

I.

"THE TRIAL COURT ERRED IN PERMITTING THE PETITIONER TO BE INDICTED AND TRIED UPON A SET OF FACTS AND CIRCUMSTANCES WHICH FORMED THE BASIS FOR PREVIOUS JUSTICE COURT CHARGES FOR WHICH THE PETITIONER HAD BEEN TRIED, CONVICTED, AND SENTENCED."

II.

"THE TRIAL COURT ERRED IN VACATING ITS ORDER DENYING APPELLANT A SPECIAL VENIRE AND IN LATER DURING THE TRIAL DECLARING THAT A SPECIAL VENIRE HAD IN FACT BEEN GIVEN AND PETITIONER'S TRIAL ATTORNEY WAS NEGLIGENT IN NOT OBJECTING TO SAME."

III.

"THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CONSOLIDATE THE MISDEMEANOR APPEALS (TALLAHATCHIE CIRCUIT COURT NUMBERS 4266, 4267, 4268, and 4269) AND TO RECEIVE EVIDENCE RELATING TO SAME DURING TRIAL OF THE RELATED FELONY COUNT (NO. 4265) AND APPELLANT'S TRIAL ATTORNEY WAS GROSSLY NEGLIGENT IN NOT OBJECTING TO SAME."

IV.

"THE LEGAL REPRESENTATION OF THE PETITIONER AT THE TRIAL LEVEL AND AT THE INITIAL APPELLATE SUBMISSION WAS GROSSLY INCOMPETENT AND PREJUDICIALLY NEGLIGENT AND ENTITLES THE PETITIONER TO A NEW TRIAL."

V.

Accordingly, the Petitioner contends and would show that he is at present illegally confined in violation of the criminal laws of the State of Mississippi and of the United States of America; in violation of his rights under the Constitutions of the United States and the State of Mississippi as well as the laws thereunder applicable; specifi-

cally, the course of conduct pursued by the State of Mississippi is violative of the following rights owing Petitioner:

1. The right to the due process of law under the Fourteenth Amendment of the Constitution of the United States of America;

2. The right to the equal protection of the laws as embodied in the Fourteenth Amendment of the United States Constitution;

3. The correlative right to the due process of law contained in Article 3, Section 14 of the Mississippi Constitution (1890);

4. The right to the due course of law as granted by Article 3, Section 24 of the Mississippi Constitution (1890).

WHEREFORE, premises considered, the Petitioner respectfully requests that leave to file an application for a Writ of Error Coram Nobis be granted the Petitioner or in the alternative entertain a Writ of Habeas Corpus in Petitioner's behalf.

EXHIBIT "2b"

**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

MISC. NO.

**BARRY JOE ROBERTS,
Petitioner,**

vs.

**STATE OF MISSISSIPPI,
Respondent.**

**BRIEF IN SUPPORT OF APPLICATION FOR
LEAVE TO FILE WRIT OF ERROR CORAM NOBIS
OR IN THE ALTERNATIVE FOR WRIT
OF HABEAUS CORPUS**

INTRODUCTION

Petitioner's application for leave to file a Petition for Writ of Error Coram Nobis complies with the provisions of Rule 38 of the "Rules of the Supreme Court of Mississippi." Rule 38 States:

Every application for leave to file a Petition for Writ of Error Coram Nobis in the lower Court shall have attached thereto the original and two executed counter parts of the Petition proposed to be filed in the lower court, which shall be sworn to by Petitioner.

Petitioner's affidavit shall designate specifically what facts, if any, alleged in the petition are within the personal knowledge of petitioner. When the petition contains allegations of facts not within the personal

knowledge of Petitioner, it shall have attached affidavit or affidavits of some other person or persons having knowledge of the facts which are not within the personal knowledge of petitioner. The failure to attach such affidavits of persons other than petitioner may be excused upon good cause shown.

The petition shall state when the facts relied upon for issuance of the writ came to petitioner's knowledge, and shall state sufficient facts to show that there was no want of reasonable diligence on the part of petitioner or his counsel.

The petition shall be endorsed by a statement by petitioner's Counsel, if any, that he believes the Petition for Writ of Error Coram Nobis is well taken, and should be issued.

The application shall be supported by a brief, and failure to file a supporting brief may be ground for dismissal.

In the event leave is granted to file the petition, the original and one executed counterpart of the petition shall be withdrawn and filed in the lower court.

This Rule has been upheld by the Mississippi Supreme Court in the following cases: *Riley v. State*, 254 Miss. 487, 182 So.2d 397, 183 So.2d 819 (1966); *Knight v. State*, 204 So.2d 568 (Miss. 1967); *Diddlemeyer v. State*, 234 So.2d 292 (Miss. 1970); *Tarrant v. State*, 236 So.2d 360 (Miss. 1970); *Brown v. State*, 275 So.2d 103 (Miss. 1973); *Auman v. State*, 285 So.2d 146 (Miss. 1973).

I.

"THE TRIAL COURT ERRED IN PERMITTING THE PETITIONER TO BE INDICTED AND TRIED UPON A SET OF FACTS AND CIRCUMSTANCES WHICH FORMED THE BASIS FOR PREVIOUS JUSTICE COURT CHARGES FOR WHICH THE PETITIONER HAD BEEN TRIED, CONVICTED, AND SENTENCED."

In many jurisdictions, if a minor offense is embraced within a higher crime as a constituent element or component part, and on the trial of the higher offense there could be a conviction of the minor offense, a conviction of the minor offense will bar a prosecution for the higher crime. *State v. Blevins*, 134 Ala 213, 32 So 637, 92 Am St Rep 22. *People v. McDaniels*, 137 Cal 192, 69 P 1006, 59 LRA 578, 92 Am St Rep 81; *People v. Ham Tong*, 155 Cal 579, 102 P 263, 24 LRA NS 481, 132 Am St Rep 110. *State v. Fox*, 83 Conn 286, 76 A 302, 19 Ann Cas 682. *Sanford v. State*, 75 Fla 393, 78 So 340. *Bell v. State*, 103 Ga 397, 30 SE 294, 68 Am St Rep 102. *State v. Elder*, 65 Ind 282, 32 Am Rep 69. *State v. Sampson*, 157 Iowa 257, 138 NW 473 42 LRA NS 967. *State v. Colgate*, 31 Kan 511, 3P 346, 47 Am Rep 507; *State v. McLaughlin*, 121 Kan 693, 249 P 612. Thus a prosecution for any part of a single crime bars any further prosecution based on the whole or a part of the same crime. *Hurst v. State*, 86 Ala 604, 6 So 120, 11 Am St Rep 79; *Trawick v. Birmingham*, 23 Ala App 308, 125 So 211, cert den 220 Ala 291, 125 So 212. *People v. Stephens*, 79 Cal 428, 21 P 856, 4 LRA 845. *Clem v. State*, 42 Ind 420, 13 Am St Rep 369; *Pivak v. State*, 202 Ind 417, 175 Ne 278, 74 ALR 406. *State v. Sampson*, 157 Iowa 257, 138 NE 473, 42 LRA NS 967. *State v. Colgate*, 31 Kan 511, 3 P 346, 47 Am Rep 507; *State v. McLaughlin*, 121 Kan 693, 249 P 612. *Runyon v. Morrow*, 192 Ky 785, 234 SW 304, 19 ALR 632. *State*

v. Tooms, 326 Mo 981, 34 SW2d 61. *State v. Mowser*, 92 NJL 474, 106 A 416, 4 ALR 695. *Wilson v. State*, 45 Tex 76, 23 Am Rep 602. *State v. Emery*, 68 Vt 109, 34 A 432, 54 Am St Rep 878. Conviction or acquittal of a lower degree is an implied acquittal of all higher degrees charges in the indictment. *Presnal v. State*, 23 Ala App 578, 129 So 480. *Roland v. People*, 23 Colo 283, 47 P 269. *West v. State*, 55 Fla 200, 46 So 93. *People v. McGinnis*, 234 Ill 68, 84 NE 687, 123 Am St Rep 73. *State v. Smith*, 132 Iowa 645, 109 NW 115; *State v. Smith*, 217 Iowa 645, 109 NW 115; *State v. Smith*, 217 825, 253 NW 130. *State v. Wooten*, 136 La 560, 67 So. 366. *Com. v. Mahoney*, 331 Mass 510, 120 NE2d 645. *People v. Farrell*, 146 Mich 264, 109 NW 440. *State v. Patterson*, 116 Mo 505, 22 SW 696. *State v. Greely*, 30 NJ Super 180, 103 A2d 639, Affd 31 NJ Super 542, 107 A2d 439. *People v. Cignarole*, 110 NY 23, 17 NE 135.

It is also held that if the acts of the accused committed by him at one time, when combined, charge but one crime, a single offense has been committed and only one punishment can be inflicted. *Ballerini v. Aderholt* (CA 5th) 44F 2d 352; *People v. Twedt* (CAL APP) 27 P 2d 90, Mod on other grounds in 1 Cal 2d 392, 35 P 2d 324.

The indictment in this case charged the defendant with manslaughter by culpable negligence on the part of the Petitioner BARRY JOE ROBERTS due to the negligent reckless manner in which he allegedly operated his vehicle (see certified copy of minutes from Justice Court attached as Exhibit "1"). The testimony presented to convict the Petitioner of the misdemeanor charges, bind him over for the grand jury and convict him in the Circuit Court trial was identical.

It is urged that an act or omission which is made punishable in different ways by different provisions of

the Mississippi Code may be punished under either of such provisions but in no case should punishment be issued more than one. Further, an acquittal (or conviction and sentence) of an act under either one should bar a prosecution for the same act or omission under any other.

II.

"THE TRIAL COURT ERRED IN VACATING ITS ORDER DENYING PETITIONER A SPECIAL VENIRE AND IN LATER DURING THE TRIAL DECLARING THAT A SPECIAL VENIRE HAD IN FACT BEEN GIVEN."

The purpose of a special venire facias is to aid in the selection of persons who can render an impartial verdict. It is urged in the instant case that such a tool was necessary for the proper defense of the Petitioner and further that he was prejudiced without receiving one. "Fair trial" requires that the accused's legal rights be safeguarded and respected by a fair and impartial jury. *Fisher v. State*, 110 So. 361, 145 Miss. 116. The Constitutional guarantees of a "fair and impartial trial," require fair, unprejudiced, unbiased individual jurors who are willing to be guided by the testimony given by the witnesses and the law as announced by the court and requires defendant to be tried in an atmosphere in which public opinion is not saturated by bias, hatred, and prejudice against defendant. U.S.C.A. Const. Amend. 6; Const. Miss. 1890, Sec. 26; *Seals v. State*, 44 So.2d 61, 208 Miss. 236. *Brooks v. State*, 46 So.2d 94, 209 Miss. 150; *Berry v. State*, 54 So.2d 222, 212 Miss. 164; *Dickerson v. State*, 54 So.2d 925.

The requirements of a special venire facias are set out by statute and so provisions for selecting additional jurors when the special panel has been exhausted. In the

instant case, a special venire was requested and was later during the course of the trial "declared" to have been granted. It is urged that if the trial judge later determined that a special venire was necessary and failed to grant the Petitioner the right to one, the later pronouncement that one had been "in effect given" was prejudicial to Petitioner.

III.

"THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CONSOLIDATE THE MISDEMEANOR APPEALS AND TO RECEIVE EVIDENCE RELATING TO SAME DURING TRIAL OF THE RELATED FELONY COUNT."

More than one indictment against the same defendant or defendants charging related offenses may be consolidated for the purpose of trial in some instances (*Capone v. United States*, (CA 7th) 51 F2d 609, 76 ALR 1534, cert den 284 US 669, 76 L ed 566, 52 s ct 44), however, when the counts are so numerous as to embarrass the defense, or when, by reason of the nature of the offenses charged or because of the made of proof, there is possibility of prejudice to the defendant (*Mitchell v. Com.* 141 Va 541, 127 SE 368), the prosecution (*Pointer v. United States*, 151 US 396, 38 L ed 208, 14 s ct 410; *Sheppard v. State*, 104 Neb 709, 178 NW 616, 18 ALR 1074).

In the instant case, the jury heard evidence on related misdemeanor charges which were consolidated for appeal with the felony count for which the Petitioner was indicted. It is urged that this consolidation allowed the jury to hear evidence which otherwise would have been inadmissible on the felony indictment and that said evidence was confusing to the jury and thereby prejudicial to the Petitioner.

IV.

"THE LEGAL REPRESENTATION OF THE PETITION AT THE TRIAL LEVEL AND AT THE INITIAL APPELLATE SUBMISSION WAS GROSSLY INCOMPETENT AND PREJUDICIALLY NEGLIGENT AND ENTITLES THE PETITIONER TO A NEW TRIAL."

An accused is guaranteed the right to be represented by counsel by the United States Constitution and by most State constitution, and by statutes. An accused person is entitled to the benefit of counsel at every stage of a criminal prosecution. *Powell v. Alabama*, 287 US 45, 77 L ed 158, 53 s ct 55, 84 ALR 527. Counsel should have sufficient ability and experience to fairly represent the defendant, present his defense, and protect him from undue oppression. *Carlson v. People*, 91 Colo 418, 15 P2d 625. A defendant also has a right to have effective counsel. *Powell v. Alabama*, 287 US 45, 77 L ed 158, 53 s ct 55, 84 ALR 527; *Hawk v. Olson*, 326 US 271, 90 L ed 61, 66 set 116.

A new trial may be granted when the defendant's counsel has grossly mishandled the defense of a defendant. *People v. Gardiner*, 303 Ill 204, 135 NE 422; *State v. Gunter*, 30 LaAnn 536; *Roper v. Territory*, 7NM 255, 33P 1014.

In the instant case, it is urged that the failure of the Attorney for Petitioner to object to matters set out in this brief in numbers "I", "II" and "III" and other matters clearly establish that the Petitioner is entitled to show that his reputation was prejudicially incompetent and negligent.

Further, it is urged that Petitioner was advised that he could not request of change of venue. This advice was clearly in error and an application, if properly pleaded and supported by sufficient facts, makes out of a case where relief by petition for error coram nobis is appropriate. *Dunn v. Reed*, 309 So.2d 516 (Miss. 1975); *Baker v. State*, (Miss. - 1978) 358 So.2d 401.

EXHIBIT "1"

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Docket #1

GENERAL AFFIDAVIT**THE STATE OF MISSISSIPPI****TALLAHATCHIE COUNTY**

BEFORE ME Sandra Brett Johnson a Justice Court Judge of said County, in Justice District No. 1, Clinton Earl Bonner makes affidavit that Barry Joe Roberts on or about August 6, 1977, in the county aforesaid, in said Justice's District #1, did unlawfully and feloniously commit manslaughter, contrary to the statutes and—contrary to section 97-3-47 of Miss. Code 1972 as amended against the peace and dignity of the State of Mississippi.

/s/ Clinton Earl Bonner

Sworn to and subscribed before me, this 10th day of August, 1977.

/s/ Sandra Brett Johnson
Justice Court Judge

A Preliminary Hearing was held in my court for Barry Joe Roberts on this charge of manslaughter.

/s/ Sandra Brett Johnson
Justice Court Judge
Route One
Enid, Mississippi 38927

EXHIBIT "3"

**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

NO. 51,552

**BARRY JOE ROBERTS,
Appellant,**

vs:

**STATE OF MISSISSIPPI,
Appellee.**

STATEMENT OF CASE

This is a manslaughter conviction based on the culpable negligence statute because of the death of a child in an automobile-truck collision.

ACTION OF THE TRIAL COURT

After jury verdict against the appellant, the Court sentenced him to serve twenty years in the custody of the Mississippi Department of Corrections.

POINTS RAISED ON APPEAL

It was manifest, reversible error for the lower court to refuse appellant's motions for a peremptory instruction both at the close of the State's case and at the close of the entire case and to grant to the State instructions S-1 and S-2 (A. 7 & 8).

EXHIBIT "3a"

**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

NO. 51,552

**BARRY JOE ROBERTS,
Appellant,**

vs:

**STATE OF MISSISSIPPI,
Appellee.**

ASSIGNMENT OF ERRORS

Now comes Barry Joe Roberts, Appellant, by his attorney, and says that in the record and proceedings and in rendering the judgment in this case there is manifest, reversible error in this, to-wit:

1. Refusing to grant appellant's motions for a peremptory instruction both at the close of the State's case and at the close of the entire case.
2. Granting to the State instructions S-1 & S-2.

EXHIBIT "3b"**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

NO. 51,552

BARRY JOE ROBERTS,
Appellant,

vs:

STATE OF MISSISSIPPI,
Appellee.**BRIEF FOR APPELLANT****INTRODUCTORY**

Appellant, Barry Joe Roberts, under Section 97-3-47, Miss. Code, 1972 Ann., was indicted, tried, and convicted in the Circuit Court of the First Judicial District of Talahatchie County at the May, 1978, term, for manslaughter, because of the death of a child in an automobile-truck collision, which allegedly was the result of culpable negligence on the part of appellant. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections. He assigns as errors the failure of the lower court to sustain his motions for a peremptory instruction both at the close of the State's case and at the close of the entire case; and the granting of the State's instructions S-1 & S-2.

STATEMENT OF FACTS

In the afternoon, about six p. m., on August 6, 1977, the appellant was driving his car on Highway 35 between

Charleston and Batesville. J. B. Byars was riding with him; about five miles north of Charleston a tape fell out of his tape player, fell under his legs, and he reach down to get it and as he looked back up he was off the shoulder of the black top road and on some gravel; he pulled the car back up on the road and he lost control of it and it started sliding sideways and he hit head-on a truck in which Mrs. Bonner was driving (in her correct lane) in a southerly direction; as a result of this collision, Mrs. Bonner's ten year old daughter, Brenda, was killed. She was riding in the back of the truck (with no side rails) with some other children. For a more detailed statement of Appellant's testimony see (A. 6).

ARGUMENT

We are unable to see any evidence of culpable negligence such as would come within the condemnation of the statute. *Smith v. State*, 197 Miss. 802, 20 So. 2d 701, 161 A.L.R. 1 (1945) and the authorities cited therein; *Gant v. State*, 244 So. 2d 18 (Miss. 1971).

Note the instructions given the State (A. 7 & 8), we invite this Honorable Court's attention to the similarity of the instruction in the Cutshall case cited in *Smith*, supra, where this Court said:

"the driving of a vehicle by one who is under the influence of intoxicating liquor is a misdemeanor.— The driving of an automobile while in this condition is therefore per se negligence—. But this does not mean that such evidence constitutes a prima facie case of manslaughter.—The same may be said in regard to the act of the defendant when he "carelessly and negligently . . . drove his car from the west side . . . to the east side of the road."

(197 Miss. at 814)

CONCLUSION

Hence, we submit that this case should be reversed and this appellant discharged; however, if we are mistaken in this particular, then we submit this case should be reversed and remanded.

EXHIBIT "3c"**IN THE
SUPREME COURT OF THE STATE
OF MISSISSIPPI**

NO. 51,552

BARRY JOE ROBERTS,
Appellant,

vs.

STATE OF MISSISSIPPI,
Appellee.**ABSTRACT OF RECORD**

Appellant, Barry Joe Roberts, was indicted, tried, and convicted in the circuit court of the first judicial district of Tallahatchie County for manslaughter, because of the death of a child in an automobile-truck collision, which allegedly was the result of culpable negligence on the part of appellant. He was sentenced to serve twenty years in the custody of the Mississippi Department of Corrections.

TESTIMONY OF STATE'S WITNESSES.**TESTIMONY OF J. C. RICHARDSON
(R. 34-39)**

I am J. C. Richardson and have been employed by the Mississippi Highway Patrol for twenty eight years; I'm Assistant Director of the Driver Improvement Bureau. I have the record of people that's suspended and revoked and handle all those cases. I have with me the record of Barry Joe Roberts. On August 6, 1977, he was under

suspension; on May 17, 1975, his drivers license had been revoked; he is eligible to have them restated now and was eligible on August 6, 1977, provided he would show proof of financial responsibility, but he has not yet shown proof of financial responsibility.

TESTIMONY OF LOUISE GOAD

(R. 39-46)

I am Louise Goad and operate a place of business, in which, among other things, I sell beer. Barry Joe Roberts came into my place between 5:30 P. M. and 6 P. M., on the 6th. day of August, 1977. He bought him and the boy that was with him a beer, and the best I recall, he carried a six pack with him. I could tell he had been excessively drinking; when he drove his car away from my place, he always spun off, slung gravel everywhere.

TESTIMONY OF E. J. DUNGAN

(R. 46-71)

I am E. J. Dungan; I live about five miles north of Charleston on Highway 35; I worked in law enforcement for about five years (with the Sheriff's office and the police at Charleston); on August 6, 1977, about 6:45 or 7 o'clock in the afternoon Barry Joe Roberts was driving by my house on Highway 35 in a northerly direction about ninety miles per hour; I went up to the scene of the accident; it happened in Mrs. Bonner's lane of the highway and she was the driver of the truck; I found Barry Joe near the woods about 200 yards from the wreck. He was just sitting there—sitting on a big mound of dirt with his head down. He was bleeding some, pretty well shook up I would say. It kinda—I don't know—he didn't seem to recognize us. As far as Barry Joe being under the influence of intoxicants or alcoholic beverages, I

couldn't swear to it. The pictures here truly show the condition of the truck, car, etc. after the wreck. There were six children and two adults in the pick-up. They all were hurt.

TESTIMONY OF W. T. BARKLEY

(R. 78-103)

I am W. T. Barkley; am a Minister of a church at Crowder; on August 6, 1977, about 6:45 or 7 o'clock p.m., my wife and I were riding in my car in a southerly direction on highway 35; a red maroon Ford pickup passed us going in the same direction; we were driving along behind this pickup and I seen a car approach coming from Charleston or the Charleston area, coming north, and I seen a cloud of dust fly up, and it was a car run off the road. And the car turned sideways when it went off the road; he jerked it back on the road and it turned sideways. When he come back up on the road he turned it back the other way and it turned sideways again. And when it turned sideways again, it slammed into the front of the pickup that was following ahead of me. It collided with the pickup over in the pickup's lane; the car broke into and come in the front of my car and went off into the west side of 35 Highway. When I went to the car it smelt like there was a beer truck wrecked rather than a car. I heard the passenger of that car say: "I told him to slow down; was going to have a wreck and kill somebody." But I never did hear the driver say anything that I recall. Some of the children were in the back of the pick-up which had no side rails. Highway 35 is a blacktop road about the same width of a regular highway. When I saw the car coming from the south towards the north, I would guess that it was 500 feet from the pick-up when the car hit the dust and the dust flew up. The dust was coming from the right side of the road as the

car was traveling north. The car come off the shoulder back onto the blacktop, he crossed up to the left and he cut it back and he crossed up again to the right and when he come off back up to the right, he crossed up again and the back end of his car hit the front end of the pickup; when got back on the road it was sideways on the highway; if that pickup truck, the way it stopped, if it were to back straight west off of the highway, it could have gone off without going into the ditch.

TESTIMONY OF MARGARET BARKLEY
(R. 103-116)

I am Margaret Barkley, wife of W. T. Barkley, and I was riding with him at the time of the wreck; the pickup with the children in it passed us going in the same direction we were going in. I could see it at all times until the accident. The impact broke the car into two pieces; the passenger in the car said: "I told him to slow down; that he was going to kill somebody." And he also said what made him leave the road in the first place, said he was messing with the tapes and things is what caused to leave the road in the first place. The pickup did not have any side rails.

TESTIMONY OF MARY ETTA BONNER
(R. 116-138)

I am Mary Etta Bonner, the driver of the pickup, and am the mother of Brenda Gayle who got killed in the wreck. In the pickup, besides myself, it was four of my children; Liz Tingle and her little three year old girl; and Mike Kilgore. I think he was about 16 or 17. In the back of the truck were Liz Tingle, her three year old child, my ten year old child, the little Kilgore boy, and my 15 year old daughter. On the day of the collision I was driving the pickup in a southerly direction on High-

way 35. I entered the highway about three and a half miles from where the accident took place; as I approached Sherman Creek I was driving about 35 miles per hour; when I first saw the car it was traveling at a high rate of speed, and the car left the road on the left. He was going north, and it went off the highway and it swerved back up into the highway, and then it just went in a spin and come over on my side of the road and hit me. And I just stopped. When I saw it coming at a high rate of speed and saw it leave the highway. I began to stop. I told my little girl that was sitting up front with us, I said, "My Lord, that car is going to hit us before it gets straightened up." By the time I said it, it had hit us. The collision occurred in my lane of traffic. Well, after it hit, I don't know how much time passed, but when I come to, I raised up off the steering wheel, and someone was trying to get the door open on my side, to get us out. And then I seen that my little boy was—he said, "oh mama, my leg." And I reached down to feel of his leg, and my little girl showed me that her leg was cut. I got out of the truck and walked to the back of the truck. That's when I saw Brenda. And I don't remember then until I got in the ambulance. The next thing I remember we was getting out at the hospital. All of us got hurt. I was in the hospital for three weeks. We had five in the backend the truck, four children and a grownup. I did not have any side rails on the pickup. I saw the car go off the blacktop. I saw that the car was out of control and went into a spin.

TESTIMONY OF DR. CHARLES WILSON TAINTOR
(R. 138-142)

I'm a physician and on August 6, 1977, about 8 P.M. I examined Brenda Gayle Bonner, a female, ten years of age and she was dead. I felt that she had a broken neck

and it was caused by the collision of the car with the pickup.

TESTIMONY OF THOMAS McCLOUD

(R. 143-162)

I am Thomas McCloud, an employee of the Mississippi Highway Patrol for about ten years. I investigate automobile accidents that occur on state highways; I investigated one that happened on Highway 35 north of Charleston on August 6, 1977, about 7:30 p. m.; I smelled alcohol on Barry Joe Roberts and he told me he had been drinking beer all afternoon. He had no drivers' license. In my opinion his ability to operate a motor vehicle was impaired as the result of his drinking. I have had no medical experience. I would not say that the man was not in shock.

STATE RESTS

MOTION FOR DIRECTED VERDICT

MOTION FOR DIRECTED OVERRULED

TESTIMONY OF DEFENDANT'S WITNESSES

TESTIMONY OF J. D. BYARS

(R. 174-194)

I am J. D. Byars and was the passenger with Barry Joe Roberts when he had the wreck with the Bonner pickup. I met Barry Joe on August 6, 1977, (have known him all my life) about one or two in the afternoon and got into his car to go riding with him. When I got in the car with him I didn't smell any alcoholic beverage. We drove to J. P. Selby's place and bought two cans of beer. We rode around and then we went to Mrs. Goad's place. We bought two twelve ounce cans of beer there. When he drove away from her place—he just drove away normal—did not spin off; about five or six o'clock, we left Charleston and drove north on Highway 35. We had a

wreck about six miles out of Charleston. A tape player vibrated out of the car and Barry Joe reached under his feet to get it and the car went off the right side of the road, and he grabbed—tried to cut it back up on the road and got sideways, and there was the pickup and we hit it—Barry Joe was driving around 60 miles per hour. When he went of on the right hand side, he hit the brakes and the car went sideways for about half a city block when we then hit the pickup. I never made any statement to him that if he didn't slow down down, somebody is going to get killed. I was hurt after the collision and an ambulance carried me to the hospital in Charleston where Dr. Lewis and Dr. Taintor waited on me.

TESTIMONY OF BARRY JOE ROBERTS

(R. 194-216)

I am Barry Joe Roberts; am 21 years of age; have lived in Charleston all my life; on August 6th of last year, 1977, I rode in my car with J. D. Byars; he got in my car with me about 1:30 or 2 that afternoon; we both bought two twelve ounce size can of beer (one for him and one for me)—we purchased this at Selby's Grocery—this was the first beer I drank that particular day; we messed around a few minutes and then we went to Goad's and bought two more cans—I didn't drink all of my second can. I didn't skid off when I left her place; I drove back to Charleston and started to go to Batesville going north on highway 35; a tape fell out of my tape player, fell up under my legs, and I reached down to get it, and looked back up and I was off the shoulder of the road. I pulled the car back up on the road and it went sideways, and I lost control of it. I couldn't do nothing with it—it started sliding sideways and I looked up and there was a truck and in a few minutes I hit it, and the car come apart. I don't remember nothing after I hit the truck—it just—the

car come apart and I went on one side of the road, and J. D. went on the other side of the road. When I first saw that pickup truck, I tried to straightened my car up and get off on the other side of the road, but it wouldn't do nothing. I just kept sliding. J. D. at no time ever said I was driving too fast. I had a DWI conviction in the city court at Charleston in 1972, and also another one in 1975.

DEFENDANT AND STATE REST

**DEFENDANT RENEWS HIS MOTION
FOR DIRECTED VERDICT**

S-1

The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

- a) The deceased, BRENDA BONNER, was a living person; and
- b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a passenger with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, they you shall find the Defendant not guilty.

(R. 230)

S. 2

Culpable negligence is as used in these instructions conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness.

(R. 231)

(Filed March 23, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, ET AL.,
Respondents.

ORDER

Upon due consideration of the petition for a writ of habeas corpus filed herein, it is

ORDERED:

That within 20 days of this date respondent shall file answer to the petition in accordance with Rule 5, Rules Governing §2254 Cases. It is further Ordered that the clerk of court shall serve by certified mail on respondent and the Attorney General of the State of Mississippi a copy of the petition and this order.

This, 19th day of March, 1981.

/s/ Charles M. Powers
United States Magistrate

(Filed March 23, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CA NO. DC81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, ET AL.,
Respondents.

**ANSWER AND RETURN TO PETITION
FOR WRIT OF HABEAS CORPUS**

COMES NOW Morris Thigpen, et al., respondents in the above styled and numbered matter and files this their Answer and Return to the Petition for Writ of Habeas Corpus filed herein and would show unto the Court the following:

I.

Respondents admit the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 16, 17, 18 and 19, of the Petition.

II.

Respondents deny the allegations contained in Paragraphs 14 Ground 1, 14 Ground 2, 14 Ground 3, 14 Ground 4, and 20.

III.

Respondents admit that the petitioner filed a petition for Writ of Error Coram Nobis or in the alternative petition for Writ of Habeas Corpus in the Supreme Court of Mississippi and that the issues before the Court *sub judice* were presented to that Court and further that the Court decided the matter adverse to the Petitioner; otherwise, the petitioner denies the remaining allegations contained in Paragraphs 12 and 13 of the Petition.

AFFIRMATIVE DEFENSES

Having fully answered the allegations contained in the Petition for Writ of Habeas Corpus, respondents would show unto the Court the following, to-wit:

A.

The petition fails to state a claim upon which relief may be granted.

B.

The petitioner has failed to exhaust his available state remedies.

AFFIRMATIVE MATTERS
PURSUANT TO RULE 5

Having responded to the allegations of the petition, respondents turn now to other Rule 5 requirements. See Rule 5, Rules Governing Section 2254 cases in the United States District Courts.

1.

Petitioner is lawfully in the custody of Eddie Lucas, Warden of the Mississippi State Penitentiary, serving a

twenty (20) year sentence for the crime of manslaughter imposed by the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi in criminal action 4265. Thereafter, petitioner filed a notice of appeal to the Supreme Court of Mississippi whereupon the conviction was affirmed.

2.

Respondents submit that petitioner has exhausted all of his available state remedies and further that if any are available to him resort to such would be futile.

3.

Respondents submit that the record of the trial proceedings conducted in the state courts does embody all of the facts relevant to the issues raised in the habeas petition. All briefs, Abstracts of the Record, Assignments of Error, Petitions and Responses to such for collateral relief and all other pleadings, documents, etc. relevant to the petition are filed herewith.

4.

A copy of the record of the proceedings conducted in the State Court is submitted herewith. Respondents know of no proceedings which were recorded but not transcribed.

WHEREFORE PREMISES CONSIDERED, respondents respectfully pray that the Petition for Writ of Habeas Corpus be dismissed.

THE STATE OF MISSISSIPPI)
)
1ST. DIST. TALLAHATCHIE COUNTY)

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of 1st Dist. Tallahatchie County thereof, duly elected, empaneled, sworn and charged to inquire in and for said County and State aforesaid, at the Term aforesaid of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That BARRY JOE ROBERTS late of the County aforesaid, on or about the 6th day of August, in the year of our Lord, 1977, in the County and State aforesaid, and within the jurisdiction of this Court, did unlawfully, willfully and feloniously, kill and slay one BRENDA BONNER, a human being, by culpable negligence, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

/s/ (Illegible)

District Attorney.

/s/ (Illegible)

Foreman of the Grand
Jury.

(Filed December 9, 1977)

CAPIAS—Circuit Court

#4265

THE STATE OF MISSISSIPPI,)
 FIRST JUDICIAL DISTRICT)
 TALLAHATCHIE COUNTY)

TO THE SHERIFF OF SAID COUNTY, GREETINGS:

We command you to take the body of BARRY JOE ROBERTS, it to be found in your County, and him safely keep, so that you have his body before the Honorable Circuit Court of said District, County and State, to be holden at the Court House thereof, in the Town of Charleston, on the Instant, A.D. 1977, then and to answer unto the State of Mississippi, on a bill of indictment found by the Grand Jury of said County, for manslaughter contrary to the Statutes of the State, in such cases made and provided, and against the peace and dignity of the State of Mississippi. Herein fail not and have you then and there this writ, with the manner in which you have executed the same.

Witness my hand and seal of office, in Charleston, Mississippi, this the 8th day of December, A.D., 1977.

/s/ Paul Eastridge, Clerk

By /s/ Nanette (Illegible), D.C.

(Filed January 27, 1978)

IN THE
CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF TALLAHATCHIE COUNTY,
MISSISSIPPI

TUESDAY, DECEMBER 13, 1977

No. 4265

STATE OF MISSISSIPPI,

vs.

BARRY JOE ROBERTS.

ARRAIGNMENT

**MOTION FOR DISCOVERY AND MOTION
FOR SPECIAL VENIRE**

(The following proceedings were held in open court in the courthouse of the First Judicial District of Tallahatchie County, Charleston, Mississippi. The Defendant was present with his attorney Honorable J. W. Kellum. The State was represented by the Honorable Donald Whitten, County Attorney. Judge Dick R. Thomas presiding.)

* * *

Court: * * * Now, what about all these appeals? Are they to be continued generally?

Whitten: Mr. Kellum says he's of the opinion that we should probably try them all together. They are all—they are misdemeanors leading up to the felony charge.

Court: All right, continue all to the same date. Put that in the order, please, sir.

4266, 4267, 4268 and 4269, all being State versus Barry Joe Roberts, appealed from Justice of the Peace Court,

are hereby continued and set concurrent with the 4267 on the 17th day of May, 1978.

All rights and motions, etcetera are preserved unto the Defendant for motion by counsel.

Kellum: Thank you, sir.

This is to certify that the above transcription is a true and correct transcription of my shorthand notes taken in said cause.

/s/ (Illegible)

Court Reporter

December 14, 1977

TRANSCRIPT OF TESTIMONY

[1] IN THE
CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF TALLAHATCHIE COUNTY,
MISSISSIPPI

No. 4265

STATE OF MISSISSIPPI,

vs.

BARRY JOE ROBERTS,
Defendant.

TRIAL ON INDICTMENT FOR MANSLAUGHTER

PRESIDING:

Honorable Dick R. Thomas, Presiding Judge of the
Seventeenth Judicial District of the State of
Mississippi

APPEARANCES:

FOR THE STATE OF MISSISSIPPI:

Honorable Robert Williams, District Attorney Pro
Tempore, Southaven, Mississippi

Honorable Richard Phillips, Assistant District At-
torney Pro Tempore, Batesville, Mississippi

Honorable Donald Whitten, County Prosecuting
Attorney, Charleston, Mississippi.

FOR THE DEFENDANT:

Honorable J. W. Kellum, Attorney at Law, Post
Office Box 175, Sumner, Mississippi

PLACE OF TRIAL:

Courtroom in the Courthouse of the First Judicial District of Tallahatchie County, Charleston, Mississippi

DATE OF TRIAL:

Monday and Tuesday, May 29, 30, 1978

• • •

[143] IN CHAMBERS

(The following proceedings take place in chambers out of the presence of the Jury. The Defendant is represented in chambers by his counsel.)

BY MR. WILLIAMS: For the record, as the Court and Mr. Kellum may recall, in the preliminaries of this trial that's in progress, the Court ruled that Cause Numbers 4266, 4267, 4268, and 4269—

BY THE COURT: Wait just a minute. Did you waive the presence of your client here in chambers for this purpose?

BY MR. KELLUM: Yes, sir.

BY THE COURT: Let the record so reflect. Go.

BY MR. WILLIAMS: Those four cause numbers which I just mentioned were appeals from misdemeanor convictions in JP Court, Beat One. The Court may recall it ruled for the purpose of trial that these matters would be consolidated with 4265, which is the case in progress. The State would now move the Court for leave to sever from Cause 4265 Cause Numbers 4266, 4267, 4268 and 4269, and for further authority to remand those four cause numbers to the file.

[144] BY THE COURT: Does the Defendant interpose any objection to that?

BY MR. KELLUM: No objection.

BY THE COURT: Let the record so reflect.

* * *

[205] IN OPEN COURT

(The following proceedings take place in open court with the Jury seated in the Jury Box. The Defendant is present in open court, seated at counsel table with his counsel.

The jury instructions were read to the Jury by the Court. Opening arguments for the State were made by Mr. Donald Whitten. Mr. Kellum made the final argument for the Defendant, and then Mr. Williams made the closing argument for the State.

At 5:25 p.m. the Jury retired to its quarters to consider its verdict. At 6:15 p.m., the Jury returned to the courtroom when and where the following proceedings took place.)

BY THE COURT: I know there is a lot of feeling but I would ask you to maintain order when the Jury returns its verdict. Bring them in.

(At this point, the Jury is escorted back into the courtroom.)

BY THE COURT: Has the Jury reached its verdict?

JUROR (Unidentified): Yes, sir.

BY THE COURT: Would you hand it to the Clerk, please?

(At this point in the proceedings, the Juror hands the verdict of the Jury to the Clerk. The Clerk in turn hands

the verdict to the Court for his inspection. The Court returns the verdict [206] to the Clerk where and when the following proceedings take place in open Court.)

BY THE COURT: Will the Defendant rise with counsel?

(At this point, the Defendant stands with his attorney.)

BY THE COURT: Will the Clerk read the verdict of the Jury?

BY THE CLERK (Mr. Eastridge): "We, the Jury, find the Defendant guilty as charged."

BY MR. KELLUM: May it lease the Court, we would like to have the Jury polled.

BY THE COURT: All right, sir.

(At this point, the Jury is polled by the Court.)

BY THE COURT: Let the record show that it was an unanimous verdict

You have discharged your duties. Those of you who are on the special venire are excused finally, and we have one juror who is from the regular panel—if you are on the regular panel, be back at 1:30 tomorrow.

(At this point, the Jury leaves the Courtroom. Presently, [207] these proceedings take place.)

BY THE COURT: The Court will order a pre-sentence investigation to be held by the probation officer and upon receiving that report, I will pass sentence on this Defendant on Monday, the 12th of June, on the first day of the opening term of Court in Hernando, Mississippi. They will have ample time to conduct the pre-sentence investigation.

Sheriff, will you notify the probation officer, Mr. Steele, please, and it will be handled at that time. We will be back here at 1:30 tomorrow.

(At this point, there was discussion off the record.)

BY THE COURT: I will reserve all of your rights either to be heard at the time of sentence or another hearing. The Defendant is remanded to the custody of the Sheriff until he appears up in Hernando at 8:30 Monday, June 12th.

Case 4265

(Filed May 24, 1978)

S.

The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

- a) The deceased, BRENDA BONNER, was a living person; and
- b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a pas-

senger with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty.

S.

Culpable negligence is as used in these instructions conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness.

D-1

The Court instructs the jury that "culpable negligence" as used in this case is negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, so clearly evidenced as to place it beyond every reasonable doubt; and if, from the evidence or lack of evidence in this case you entertain a reasonable doubt as to the defendant's guilt (as to culpable negligence) then it is your sworn duty to find him not guilty.

IN THE CIRCUIT COURT OF THE FIRST
JUDICIAL DISTRICT OF TALLAHATCHIE COUNTY,
MISSISSIPPI

MONDAY, JUNE 12, 1978

NO. 4265

STATE OF MISSISSIPPI,

vs.

BARRY JOE ROBERTS,
Defendant.

SENTENCING

(The following proceedings were held in chambers in the courthouse in DeSoto County, MS. The Defendant was present with his attorney, Honorable J. W. Kellum, Sumner, MS. The State was represented by Honorable Robert L. Williams, Acting District Attorney, Water Valley, MS. Sheriff Fulks of Tallahatchie Co., MS. was present. Judge Dick R. Thomas presiding.)

Court: Mr. Kellum, is there anything you would like to say? I have the report and am ready to pass sentence.

Kellum: No, sir.

Court: Barry Joe Roberts, having been found guilty of manslaughter by culpable negligence by a jury of the First Judicial District of Tallahatchie County, Mississippi, the Court having received a pre-sentence investigation, it is the sentence of this Court that you be sentenced to serve a term of 20 years in an institution designated by the Mississippi Department of Corrections. That's a heavy sentence and I mean for it to be heavy because

there is a dead person involved but that doesn't mean that all is lost. If you go down there with the attitude that you're going to make a good prisoner and show them that attitude, that you are sorry, and work at it then you have the hope of getting your time cut. You can learn useful trades. It's not a vacation but at the same time you can come out of it with some use and with good behavior and recommendation and the proper attitude, then you have hope that your time will be cut. You have the right of visitation and other things can be done for you while you are down there, but that will be the sentence of the Court. Sheriff, he is remanded to your custody.

(Filed June 29, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

vs.

MORRIS THIGPEN, ET AL.,
Respondents.

ORDER

Pursuant to Rule 7, Rules Governing §2254 Cases, it is hereby Ordered that respondents shall within 14 days of this date file with the court all records relating to the misdemeanor convictions appeal of which was consolidated with petitioner's manslaughter trial and which are referred to in the record of the manslaughter trial as Cause Nos. 4266, 4267, 4268, and 4269.

ORDERED, this 26th day of June, 1981.

/s/ (Illegible)

United States Magistrate

(Filed July 10, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CIVIL ACTION NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, ET AL.,
Respondents.

SUPPLEMENT TO RULE 5 EXHIBITS

Pursuant to the Court's order of June 26, 1981, respondents in the above-styled and numbered matter attach hereto certified copies of the abstracts in cases 4266, 4267, 4268 and 4269. Counsel for the respondents is informed by the Circuit Clerk of Tallahatchie County, Mississippi, that all of said matters were passed to the files subsequent to the hearing on the manslaughter conviction.

(Filed September 1, 1977)

IN THE JUSTICE OF THE PEACE COURT
IN AND FOR DISTRICT ONE,
TALLAHATCHIE COUNTY,
MISSISSIPPI

Case #4266

STATE,

-versus-

BARRY JOE ROBERTS,
DEFENDANT:

ORDER

This day this cause came on to be heard on the affidavit of McCloud, Miss. Highway Patrol, charging the defendant herein with reckless driving, and the Court having now heard the matter, made the following disposition and order.

That the defendant was found (guilty) as charged and he was ordered to pay a fine of \$100.00 and to serve a term of 0 days in the county jail.

That defendant gave proper notice of his intention to appeal this decision to the Circuit Court and that on notice, his bond was set in the penal sum of \$200.00 by posting same in cash or with sufficient sureties to be approved by the Sheriff of this county.

It is therefore ordered that this matter be transferred to the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, for final disposition or writ of procedendo to this court.

This the 13th day of August, 1977.

/s/ Sandra B. Johnson
Justice of the Peace
District 1

I certify that I have this date delivered the original of this order to the Circuit Clerk for posting on the proper docket.

/s/ Sandra B. Johnson
Justice of the Peace

Aug. 13, 1977
Date

(Filed September 1, 1977)

IN THE JUSTICE OF THE PEACE COURT
IN AND FOR DISTRICT ONE,
TALLAHATCHIE COUNTY,
MISSISSIPPI

Case #4267

STATE

-versus-

BARRY JOE ROBERTS,
DEFENDANT:

ORDER

This day this cause came on to be heard on the affidavit of McCloud, Miss. Highway Patrol, charging the defendant herein with driving while license was under suspension, and the Court having now heard the matter, made the following disposition and order.

That the defendant was found (guilty) as charged and he was ordered to pay a fine of \$100.00 and to serve a term of 6 months in the county jail.

That defendant gave proper notice of his intention to appeal this decision to the Circuit Court and that on notice, his bond was set in the penal sum of \$200.00 by posting same in cash or with sufficient sureties to be approved by the Sheriff of this county.

It is therefore ordered that this matter be transferred to the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, for final disposition or writ of procedendo to this court.

This the 13th day of August, 1977.

/s/ Sandra B. Johnson
Justice of the Peace
District 1

I certify that I have this date delivered the original of this order to the Circuit Clerk for posting on the proper docket.

/s/ Sandra B. Johnson
Justice of the Peace

Aug. 13, 1977
Date

(Filed September 1, 1977)

IN THE JUSTICE OF THE PEACE COURT
IN AND FOR DISTRICT ONE,
TALLAHATCHIE COUNTY,
MISSISSIPPI

Case #4268

STATE

-versus-

BARRY JOE ROBERTS,
DEFENDANT:

ORDER

This day this cause came on to be heard on the affidavit of McCloud, Miss. Highway Patrol, charging the defendant herein with driving on wrong side of road, and the Court having now heard the matter, made the following disposition and order.

That the defendant was found (guilty) as charged and he was ordered to pay a fine of \$100.00 and to serve a term of 10 days in the county jail.

That defendant gave proper notice of his intention to appeal this decision to the Circuit Court and that on notice, his bond was set in the penal sum of \$200.00 by posting same in cash or with sufficient sureties to be approved by the Sheriff of this county.

It is therefore ordered that this matter be transferred to the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, for final disposition or writ of procedendo to this court.

This the 13th day of August, 1977.

/s/ Sandra B. Johnson
Justice of the Peace
District 1

I certify that I have this date delivered the original of this order to the Circuit Clerk for posting on the proper docket.

/s/ Sandra B. Johnson
Justice of the Peace

Aug. 13, 1977
Date

(Filed September 1, 1977)

IN THE JUSTICE OF THE PEACE COURT
IN AND FOR DISTRICT ONE,
TALLAHATCHIE COUNTY,
MISSISSIPPI

Case #4269

STATE

-versus-

BARRY JOE ROBERTS,
DEFENDANT:

ORDER

This day this cause came on to be heard on the affidavit of McCloud, Miss. Highway Patrol, charging the defendant herein with driving under influence, and the Court having now heard the matter, made the following disposition and order.

That the defendant was found (guilty) as charged and he was ordered to pay a fine of \$1000.00 and to serve a term of 11 months in the county jail.

That defendant gave proper notice of his intention to appeal this decision to the Circuit Court and that on notice, his bond was set in the penal sum of \$2000.00 by posting same in cash or with sufficient sureties to be approved by the Sheriff of this county.

It is therefore ordered that this matter be transferred to the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi, for final disposition or writ of procedendo to this court.

This the 13th day of August, 1977.

/s/ Sandra B. Johnson
Justice of the Peace
District 1

I certify that I have this date delivered the original of this order to the Circuit Clerk for posting on the proper docket.

/s/ Sandra B. Johnson
Justice of the Peace

Aug. 13, 1977
Date

(Filed July 10, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CIVIL ACTION NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, ET AL.,
Respondents.

**PETITIONERS RESPONSE TO RESPONDENTS
RULE 5 EXHIBITS**

In response to Respondents' Rule 5 Exhibits, Petitioner would show that there are no remand orders in the case file of 4266, 4267, 4268 and 4269 (See Exhibit "1") and the dates of said remands cannot be determined.

It is therefore urged that this matter is controlled by the trial transcript which indicates that the matters were consolidated for appeal.

(Filed August 17, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, ET AL.,
Respondents.

ORDER

Upon review of the petition for writ of habeas corpus filed herein, and to enable the court to evaluate properly petitioner's claims, it is hereby Ordered that within 14 days of this date petitioner shall supplement his petition to specify what evidence he contends was properly admitted on the misdemeanor appeals in question that was not otherwise admissible on the manslaughter charge against petitioner.

ORDERED, this 14th day of August, 1981.

/s/ Charles M. Powers
United States Magistrate

(Filed October 1, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, ET AL.,
Respondents.

ORDER

It is hereby Ordered that respondent shall within 14 days of this date file a memorandum setting forth the reasons, if any, why petitioner should not be granted habeas relief under the authority of Blackledge v. Perry, 417 U.S. 21, 40 L.Ed.2d 628 (1974).

SO ORDERED, this 29th day of September, 1981.

/s/ Charles M. Powers
United States Magistrate

(Filed November 4, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, ET AL.,
Defendants.

REPORT AND RECOMMENDATION

(The Magistrate's Report and Recommendation is reproduced in full as Exhibit 1 of the Appendix to the Petition for Certiorari in the present case. It can be found at pages A1 through A4 of the Petition.)

(Filed December 8, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CIVIL ACTION NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, ET AL.,
Respondents.

**RESPONDENT'S OBJECTION TO MAGISTRATE'S
REPORT AND RECOMMENDATION**

Comes now the Respondent in the above-styled and numbered cause and files his objection to Magistrate's Report and Recommendation filed November 3, 1981, and would show unto the Court the following:

I.

On November 3, 1981, the Magistrate filed a Report and Recommendation setting forth reasons why Petitioner should be granted habeas relief based upon the "Double Jeopardy Clause" of the United States Constitution. The Magistrate's Report and Recommendation also states that Petitioner may be granted relief based upon his right to due process of law under the Fourteenth Amendment.

II.

Addressing the double jeopardy question Magistrate Powers in his Report and Recommendation states:

It is thus apparent that manslaughter by automobile in violation of § 97-3-47 cannot be proved without at the same time proving reckless driving in violation of § 63-3-1201, and that conduct of petitioner that constituted reckless driving—losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle—is *the same conduct that constituted the culpable negligence necessary for the manslaughter conviction.* [Emphasis Added].

Respondent would note to the Court that § 63-3-1201 and the conduct before the accident are considered "traffic offenses" in Mississippi. Those offenses consist wholly of the conduct of an operation of a motor vehicle upon the highways of this state and do not involve a wrongful homicide. The crime of manslaughter involves a wrongful homicide, an element altogether lacking in the traffic offenses.

Section 63-3-1201, Reckless Driving, requires that the vehicle be driven on the highways of this state before a citation can be issued. A motorist could not be given a citation for driving reckless in a private parking lot, however, that same motorist could be guilty of manslaughter under § 97-3-47 for the unintentional killing of someone in that private parking lot. It is clear that the two offenses are distinct both in law and fact. The traffic offenses are not lesser degrees of the crime of manslaughter.

As stated in Annot. 172 A.L.R. 1053 (1948), *Acquittal of One Offense in Connection With Operation of Automobile as Bar to Prosecution of Another.*

... it should be borne in mind that there is a distinction between an offense and the unlawful act out of which it arises and that the rule that a person shall

not be twice put in jeopardy for the same offense is directed to the identity of the offense and not to the act. [Emphasis Added].

... where two offenses, committed in the operation of a motor vehicle, are separate and distinct and the one is not necessarily included in the other, a prosecution for the one is no bar to a prosecution for the other, even though both offenses were committed at the same time and by the same act.

The Court in *Bacom v. Sullivan*, 200 F.2d 70 (5 Cir. 1952), cert. denied, 345 U.S. 910, 73 S.Ct. 651, 97 L.Ed. 1345 (1953) stated:

To constitute double jeopardy, it is not enough that the second prosecution arises out of the same facts as the first. It must be for the same 'offense.' The same act may constitute an offense against two separate statutes. The recognized test for determining the identity or separateness of offenses charged in two indictments is whether or not the same proof will sustain a conviction under both or whether one requires proof of facts, not required by the other. *Chrysler v. Zerbst*, 10 Cir., 81 F.2d 975; *McGinley v. Hudspeth*, 10 Cir., 120 F.2d 523.

If one statute requires proof of a fact which the other statute does not, then the offenses are not the same, and a conviction or acquittal under one does not bar a prosecution under the other as double jeopardy. *Graveires v. United States*, 220 U.S. 338, 31 S. Ct. 421, 55 L.Ed. 489; *Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500; *Sims v. Rives*, 66 App. D.C. 24, 84 F.2d 871, cert. denied, 298 U.S. 682, 56 S.Ct. 960, 80 L.Ed. 1402. In the latter case, quoting from *Morgan v. Devine*, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed.

1153, it was aptly said '* * * the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.' [66 App. D.C. 24, 84 F.2d 876].

In *Cutshall v. State*, 191 M. 764, 4 So.2d 289 (Miss. 1941) the Supreme Court of Mississippi stated:

The driving of a vehicle by one who is under the influence of intoxicating liquor is a misdemeanor. § 49, Ch. 200, Laws 1938. The driving of an automobile while in this condition is therefore per se negligence. *Williams v. State*, 161 Miss. 406, 137 So. 106. But this does not mean that such evidence constitutes a prima facie case of manslaughter. (citations omitted)

It must be kept in mind that appellant is here prosecuted not for driving while under the influence of intoxicating liquor but for culpable negligence. These are separate offenses for which one could be separately prosecuted and neither prosecution would bar the other. See *State v. Sisneros*, 42 N.M. 500, 82 P.2d 274; *People v. Townsend*, 214 Mich. 267, 783 N.W. 177, 16 A.L.R. 902, 8 R.C.L. 147; *Holland v. State*, 123 Fla. 142, 166 So. 468. In a prosecution for manslaughter referable to culpable negligence, intoxication could be a relevant evidential facts. Yet it is not as controlling that the defendant in manslaughter was violating the traffic laws as that he was in fact culpably negligent. One may be negligent while acting lawfully. *State v. Brewen*, 169 Iowa 256, 151 N.W. 102; *Commonwealth v. Amatucci*, 29 Del. Co. R., Pa., 160. One may violate the law and yet not be culpably negligent in fact. *Commonwealth v. Aurick*, 138 Pa. Super. 180, 10 A.2d 22; *People v. Warner*, 27 Cal. App. 2d 190, 80 P.2d 737; *Commonwealth v. Williams*, 133 Pa. Super. 104, 1

A.2d 812. It is sufficient in a prosecution for the misdemeanor that the defendant be driving while under the influence of liquor. No injury need be shown.

The Supreme Court of Iowa addressed the same issues as are now before this Court in a very similar case. Also in that case the United States Supreme Court refused to hear petitioner's appeal. That case was *State v. Stewart*, 223 N.W.2d 250 (1974), cert. denied, 423 U.S. 902, 96 S.Ct. 205, 46 L.Ed.2d 134. In that case the Court held that defendant's reckless driving conviction which arose out of the same occurrence was not a lesser included offense of manslaughter and former jeopardy did not bar defendant's conviction of manslaughter.

In *State v. Stewart*, *supra*, the Court stated:

There are two steps in determining whether one offense is included within another. The first is a consideration of the elements. The lesser offense must be composed solely of some but not all elements of the greater crime. *The lesser crime must not require any additional element which is not needed to constitute the greater crime.* The lesser offense if therefore said to be necessarily included within the greater. [Emphasis Added].

It is only after the elements of the lesser crime are shown to be necessarily included in the greater crime that a second inquiry is made. The second inquiry is a factual one, undertaken on a case by case basis. . . . *the lesser crime (reckless driving) requires additional elements not needed to constitute the greater crime (manslaughter).* [Emphasis Added].

There are three elements to the crime of reckless driving under § 321-283, The Code. They are (1) the conscious and intentional operation of a motor

vehicle (2) in a manner which creates an unreasonable risk or harm to others (3) where such risk is or should be known to the driver. *State v. Baker*, 203 N.W.2d 795, (796) (Iowa) and authorities. Manslaughter under § 690-10, The Code, is the unlawful unintentional killing of a human being by another without malice express or implied. *State v. Boston*, 233 Iowa 1249, 1255, 11 N.W.2d 407, 410. We have no vehicular homicide statute in Iowa. But our cases acknowledge manslaughter can be committed by operating a motor vehicle in either of two ways. Manslaughter may result from the reckless operation of a motor vehicle. *State v. Wallin*, 195 N.W.2d 95, 99 (Iowa 1972); *State v. Means*, 211 N.W.2d 283 (Iowa 1973). It may result from operating a motor vehicle while intoxicated. *State v. Davis*, 196 N.W.2d 885, 890 (Iowa 1972).

However under either theory proof of manslaughter requires proof of fact (resultant death) which the other (either reckless driving or driving while intoxicated) does not. See *State v. Cook*, *supra*, and *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309.

233 N.W.2d at 253:

We think that reckless driving and manslaughter are not the same for former jeopardy purposes. We approve the following:

'The offense of reckless driving is not the same in law or in fact as, nor is it a lesser degree of, the offense of manslaughter arising out of the operation of a motor vehicle, even though they may arise from the same occurrence or transaction, and consequently an acquittal or conviction of reckless driving will not

be a bar to a prosecution for manslaughter arising out of the same facts. Nor will an acquittal or conviction of manslaughter serve as a bar to a prosecution for reckless driving arising out of the same facts does not bar a subsequent prosecution for causing the death of another by reckless driving, the offense not being the same.' 7 Am.Jur.2d, Automobiles and Highway Traffic, § 343, pages 889-890. See also 22 C.J.S. Criminal Law § 295(2), pages 771-772.

We conclude defendant is wrong in claiming reckless driving is a less included offense to manslaughter.

The Magistrate states that guidance of petitioner's contention, that he is entitled to habeas relief on the ground that trial on the manslaughter charge after trial and conviction of the misdemeanors violated his rights under the Double Jeopardy Clause of the Fifth Amendment, may be found in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980). The Supreme Court in *Illinois v. Vitale*, held:

The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also providing a careless failure to reduce speed and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision.

Of course, any collision between two automobiles or between an automobile and a person involves a moving automobile and in that sense a "failure" to slow sufficiently to avoid the accident. But such a "failure" may not be reckless or even careless, if when the dan-

ger arose, slowing as much as reasonably possible would not alone have avoided the accident yet, reckless driving causing death might still be proved if, for example, a driver who had not been paying attention could have avoided the accident at the last second, had he been paying attention, by simply swerving his car. The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the Blockburger test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.* [Emphasis Added]. (65 L.Ed.2d at 237)

The Court in *State v. James*, 606 P.2d 1101 (N.M. App. 1979), found that the municipal court record did not show a plea of guilty or a trial to determine guilt or innocence on the traffic offense charge, the Court held that such circumstances did not rise to the level of a conviction for purposes of double jeopardy. It was then further held:

We also reassert the jurisdictional exception to using a lesser included offense as a bar to prosecution of the greater offense. The exception was set forth in *State v. Goodson*, 54 N.M. 184, 217 P.2d 262, 263 (1950), where the court quoted the following language from 1 F. Wharton, Criminal Law § 394 (12th ed.):

'And a conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the lesser offense is included in the greater offense, and visa versa. But a former trial and acquittal or prosecution, unless the defendant could have been convicted on the same evidence in the former

trial, of the offense charged in the subsequent trial. An acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense.'

The exception was recognized in the specially concurring opinion of Justice Sosa in *State v. Tanton*, 88 N.M. 333, 337, 540 P.2d 813, 817 (1975):

I would hold that conviction bars prosecution of a greater offense, subject to one exception: If the court does not have jurisdiction to try the crime, double jeopardy cannot attach. Double jeopardy requires that a court have sufficient jurisdiction to try the charge.

The exception does not conflict with the United States Supreme Court decision in *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970). The Waller decision stands for the proposition that two courts within a state—district and municipal—cannot each try a person for the same crime. However, the Supreme Court recognized the possible existence of exceptions to this rule. *Id.* at 395, n. 6, 90 S.Ct. 1184. In *Ashe v. Swenson*, 397 U.S. 436, 453, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Mr. Justice Brennan specified and elaborated upon several of these exceptions in his concurring opinion. He stated: 'Another exception would be necessary if no single court has jurisdiction of all the alleged crimes.' *Id.* at 453, n. 7, 90 S.Ct. at 1199, n. 7.

It is clear that the justice court in the case presently before this Court was acting pursuant to its authority to punish petitioner for his traffic infractions, but it is equally

clear that it had no authority to prosecute for manslaughter. Consequently, under the jurisdictional exception the State's felony prosecution against petitioner was correct.

The jurisdictional exception observed in *James* has long possessed a statutory basis in Mississippi. Section 99-11-33, Mississippi Code Annotated (1972). See also: *Huffman v. State*, 84 Miss. 479, 36 So. 395 (1904).

Respondent submits that petitioner is not entitled to habeas relief. Respondent respectfully submits that petitioner's rights under the Double Jeopardy Clause of the Fifth Amendment were not violated and therefore petitioner's petition for habeas relief should be denied.

III.

Addressing the due process question, Magistrate Powers relies on *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed. 2d 628, 94 S.Ct. 2098, as controlling.

Blackledge, supra, deals with a North Carolina prisoner charged first with the misdemeanor assault with a deadly weapon on another prisoner. Blackledge was convicted in the state district court on this misdemeanor charge. Blackledge appealed this conviction to the superior court, and before the appeal was heard the prosecutor obtained an indictment covering the same conduct for the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury, to which Blackledge pled guilty.

Thereafter, Blackledge applied for a writ of habeas corpus in federal district court claiming that the felony indictment deprived him of due process. The district court granted the writ, and the court of appeals affirmed. *Blackledge, supra*, contains two (2) main issues: (1) the right under state law to a trial de novo without appre-

hension that the state will retaliate by substituting a more serious charge for the original one and thus subject him to a significantly increased potential period of incarceration; (2) that since Blackledge was originally convicted on a misdemeanor charge in state district court, North Carolina was precluded by the due process clause from even prosecuting Blackledge for the more serious charge in the superior court. Blackledge's guilty plea to the felony did not bar him from raising his constitutional claims in the federal habeas corpus proceedings.

Blackledge, supra, may be distinguished from the case presently before this Court in several ways.

In *Blackledge, supra*, the defendant was tried and convicted in the state district court of the misdemeanor charge of assault with a deadly weapon (G.S.N.C. § 14-33), and later pled guilty, after indictment, to the felony charge of assault with a deadly weapon with intent to kill and inflict serious bodily injury (G.S.N.C. § 14-32), arising from the same facts.

A look at the N.C. Gen. Stat. § 14-32 footnote (Elements of Offense), p. 345, Chapter 14 states:

In order for a conviction of crime under the provisions of this section there must be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting and while an assault does not necessarily include a battery, where serious injury is inflicted a battery is necessarily implied. *State v. Hefner*, 199 N.C. 788, 155 S.E. 879 (1930).

A look at N.C. Gen. Stat. 14-33(b), p. 353, states:

Unless his conduct is covered under some other provision of law providing greater punishment, any per-

son who commits any aggravated assault, assault and battery, or affray is guilty of a misdemeanor punishable as provided in subsection (c) below. A person commits an aggravated assault or assault and battery if in the cause of such assault or assault and battery he:

- (1) uses deadly weapon or other means or force likely to inflict serious injury or serious damage to another person; or
- (2) inflicts serious damage to another person; or
- (3) intends to kill another person; or
- (4) assaults a female person; or
- (5) assaults a child under the age of twelve years; or
- (6) assaults a public officer while such officer is discharging or attempting to discharge a duty of his office.

Comparing the two statutes we see that in § 14-33 (Misdemeanor Assault) the first three elements of the offense are identical to three elements found in § 14-32 (Felony Assault).

N.C. Gen. Stat. § 14-33, footnote (It is an Included Offense Under § 14-32), p. 355, Chapter 14 states:

Assault with a deadly weapon is an essential element of the felony created and defined by § 14-32, being an included "less degree of the same crime." *State v. Weaver*, 264 N.C. 681, 142 S.E.2d 633 (1956).

The offense of an assault with a deadly weapon with intent to kill under this section; a general misdemeanor, is a lesser included offense of the felony charged in a bill of indictment drawn under § 14-32. *State v. Burris*, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

It is imminently clear in *Blackledge, supra* that the misdemeanor charge arose from the same facts that resulted in the felony indictment.

Unlike *Blackledge, supra*, the present case before the Court involves several traffic misdemeanor convictions and the felony conviction of manslaughter by culpable negligence. The traffic misdemeanor convictions arose out of acts that were committed separate and apart from the felony manslaughter and surely could not be considered a lesser included offense to the crime of manslaughter for the purpose of the Double Jeopardy Clause.

The traffic misdemeanor charges which petitioner was convicted in justice court and appealed are (1) reckless driving, § 63-3-1201, 1972 Miss. Code Ann.

Any person who drives a vehicle in such a manner as to indicate either a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving.

Every person convicted of reckless driving shall be punished upon a first conviction by a fine of not less than \$5.00 nor more than \$100.00 . . .

(2) Driving while license suspended or revoked, § 63-1-57, 1972 Miss. Code Ann.

Any person whose operator's license, or driving privilege as a nonresident, has been canceled, suspended or revoked as provided in this article, and who drives any motor vehicle upon the highways of this state, while such license or privilege is canceled, suspended, or revoked, is guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than two days or more than six months. There may be imposed in addition thereto a fine of not more than one hundred dollars (\$100.00) for each offense.

(3) Driving on wrong side of road; Vehicle shall be driven on right half of roadway; exceptions § 63-3-601, 1972 Miss. Code Ann.

Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
2. When the right half of the roadway is closed to traffic while under construction or repair;
3. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or
4. Upon a roadway designated and sign-posted for one-way traffic.

(4) Driving under the influence; Operation of vehicle while under the influence of intoxicating liquor; results of chemical test unavailable, § 63-11-33, 1972 Miss. Code Ann.

1. It is unlawful for any person to drive or otherwise operate a vehicle within this state who is under the influence of intoxicating liquor, punishable as set forth in subsection (2) of this section.
2. Every person convicted of operating a vehicle while under the influence of intoxicating liquor, where a chemical test was not given or where the alcoholic content was not available in the prosecution, may be imprisoned for not less than ten (10) days nor more than one (1) year and shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00),

or both. . The commissioner of public safety, or his duly authorized agent, shall revoke the license or permit to operate a vehicle within this state for a period of one year of any person who, without evidence from a chemical test, was convicted of operating a motor vehicle while under the influence as defined in subsection (1) of this section.

The felony charge to which petitioner was convicted, Homicide - all other killings, § 97-3-47, 1972 Miss. Code Ann.

Every other killing of a human being, by the act, procurement, or culpable negligence of another, and with authority of law, not provided for in this title, shall be manslaughter.

Comparing the above statutes we see that the statute covering the manslaughter conviction in no way incorporates any of the elements of the misdemeanor statutes.

The Court in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) stated:

The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932):

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . .

This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes . . .' *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 43 L.Ed.2d 616, 95 S.Ct. 1284 (1975). [Emphasis Added] (53 L.Ed.2d at 194)

In the recent case of *United States v. Cowart*, 595 F.2d 1023 (CA 5 1979), the same issue was addressed in this language:

This standard frequently has been referred to as the 'same evidence' test; however, the Blockburger test looks not to the evidence adduced at trial but focuses on the elements of the offense charged. *Brown v. Ohio*, 432 U.S. at 166, 97 S.Ct. at 2225 (Blockburger test emphasizes the elements of the two crimes); *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975) ("if each [offense] requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.") *United States v. Dunbar*, 591 F.2d 1190, 1193 (5th Cir. 1979) ("Application of the [Blockburger] test focuses on the statutory elements of the offenses charged."). (Emphasis Added) (595 F.2d at 1023)

Similarly, it was held in *Walker v. Loggins*, 608 F.2d 731 (CA 9 1979):

The application of this test focuses on the statutory elements of the offense charged, not the particular manner in which the offense was committed or described in the indictment. *Iannelli v. United States*,

420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

An examination of statutory offenses here involved reveals that each contains elements not common to the other. The offenses of reckless driving, driving while license suspended or revoked, driving on wrong side of road, driving under the influence, are predicated upon the manner of operation of a motor vehicle upon the streets or highways of this State and are in no manner dependent upon any resultant injury to persons or property. See *Barnes v. State*, 249 Miss. 482, 162 So.2d 865 (1964); *Gause v. State*, 203 Miss. 377, 34 So.2d 729 (1948); *Sanford v. State*, 195 Miss. 896, 16 So.2d 628 (1944). The crime of manslaughter by culpable negligence, by contrast, not only involves an unlawful homicide, but is not restricted as to either instrumentality or location. *Gandy v. State*, 373 So.2d 1042 (1979). See also: *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (1941). These offenses therefore are neither the same in law or fact.

Respondent submits there has been no violation of petitioner's due process rights under the Fourteenth Amendment. Based upon the foregoing authority and argument Respondent respectfully submits that petitioner's petition for habeas corpus relief should be denied.

(Filed January 21, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

v.

MORRIS THIGPEN, et al.,
Defendants.

ORDER

(The District Court's Order adopting the report and recommendation and granting the Writ is reproduced in full as Exhibit 2 of the Appendix to the Petition for Certiorari. It can be found at page A5 of the Petition

(Filed February 18, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
DELTA DIVISION

CIVIL ACTION NO. DC 81-45-LS-P

BARRY JOE ROBERTS,
Petitioner,

versus

MORRIS THIGPEN, et al.,
Respondents.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Respondents hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of January 18, 1982, entered by this Court granting Petitioner's habeas corpus relief.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4067

BARRY JOE ROBERTS,
Petitioner-Appellee,

versus

MORRIS THIGPEN, Commissioner, Mississippi
Department of Corrections, ET AL.,
Respondents-Appellants.

Appeal from the United States District Court
For the Northern District of Mississippi

(NOVEMBER 16, 1982)

Before RUBIN and JOHNSON, Circuit Judges, and
DAVIS,* District Judge.

PER CURIAM:

(The opinion of the Court of Appeals is reproduced
in full as Exhibit 4 of the Appendix to the Petition for
Certiorari. It can be found at pages A7-A13 of the Peti-
tion)

MAY 2 1983

ALEXANDER L. STEVAS,
CLERK

NO. 82-1330

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

MORRIS THIGPEN, ET AL..
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under the United States Supreme Court's holding in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed. 2d 228, 100 S. Ct. 2260 (1980) and under the Fifth and Fourteenth Amendments of the United States Constitution.

NO. 82-1330

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MORRIS THIGPEN, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respondent asks that a writ of certiorari not be issued to review the opinion of the United States Court of Appeal for the Fifth Circuit entered in this case on November 16, 1982.

OPINIONS BELOW

The Report and Recommendation and Orders of the United States District Court for the Northern District of Mississippi, which are unreported, are set out in the appendix of the Petition for the Writ herein at page A1 to page A6. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, is set out in the Appendix of the Petition for the writ herein, at page A7.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1982, (Petitioner's Appendix-Page A7). The Jurisdiction of this Court rests on 28 USC §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The Respondent sets forth the same Statement of the Case as is set forth in the Petition for the writ herein.

REASONS FOR NOT GRANTING THE WRIT

Certiorari should not be granted in this case because the opinion of the United States Court of Appeals for the Fifth Circuit properly applied the correct standard of Review under Illinois v. Vitale, 447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. (1980).

ARGUMENT

The Court of Appeals Applied the Correct Standard of Review When It Held That Roberts Has a Substantial Double Jeopardy Claim Under the United States Supreme Court's Holding in Illinois v. Vitale, 447 U.S. 410, 65L. Ed. 2d 228 100 S. Ct. 2260 (1980).

Addressing the double jeopardy question, the District Court adopting the Magistrate's Report and Recommendation states:

"It is thus apparent that manslaughter by automobile in violation of Section 97-3-47 cannot be proved without at the same time proving reckless driving in violation of Section 63-3-1201, and that conduct of Petitioner that constituted reckless driving -- losing control of his vehicle while driving under the influence, crossing the centerline and colliding with the other vehicle -- is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction." [Emphasis Added] (Petitioners' A-3).

In objecting to the Magistrate's Report and Recommendation, the Petitioners' stated:

"Section 63-3-1201 and the conduct before the accident are considered 'traffic offenses' in Mississippi. Those offenses consist wholly of the conduct of an operation of a motor vehicle upon the highways of this State and do not involve a wrongful homicide, an element altogether lacking in the traffic offenses." (Petitioners' Brief, P.5).

Here, the Petitioners appear to be saying that the Respondent could have been convicted of manslaughter by culpable negligence without introducing and relying upon the conduct of the Respondent in the operation of his vehicle before the accident. In short, the Petitioners are arguing that the "traffic offenses" were not used by the State in the prosecution to establish the criminal negligence, which must be wanton or reckless under circumstances implying danger to human life, necessary for an involuntary manslaughter conviction

with a motor vehicle in Mississippi as was set out in
 Phillpis v. State, 379 So.. 2d 318, 320 (Miss. 1980).

"The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of manslaughter for having by culpable negligence caused the death of BRENDA BONNER. If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, consistent with innocence, that (a) the deceased, BRENDA BONNER, was a living person; and (b) that she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the deceased was a passenger, with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter. If the State has failed to prove any one or more of these elements, beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, find the Defendant guilty". (Petitioners' A-12, A-13).

The State further by State's Instruction Number "2" clearly spelled out what the State considered "culpable negligence." That Instruction stated:

"Culpable negligence is, as used in these instructions, is conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the act under surrounding circumstances as to render his conduct tantamount to wilfulness." (Petitioners' A-13).

These two jury instructions clearly and unequivocally support the finding of the Magistrate. One of the misdemeanors of which Petitioner was convicted was reckless driving which is set out in Section 63-3-1301 of the Mississippi Code. It provides that:

"...That any person who drives any vehicle in such a manner as to indicate a wilful or wanton disregard for safety of persons or property is guilty of reckless driving."

In considering the Mississippi manslaughter statute, the District Court found that:

Manslaughter is defined in general terms by Miss. Code Ann. Section 97-3-47 as "Killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law..."; with regard to manslaughter by automobile, the Mississippi Supreme Court has construed the statute to explain that "the gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence, which must be wanton or reckless under circumstances implying danger to human life, *Smith v. Smith*, 20 So. 2d 701, 704 (Miss. 1945), 'that is to say, in a wanton and flagrant disregard, automobile in violation of Section 63-3-121, and that the conduct of Petitioner that constituted reckless driving -- losing control of his vehicle while driving colliding with the other vehicle -- is the same necessary for the manslaughter conviction...". [Mag. rpt. and rec., P. 3]. (Petitioner's A-11).

It is therefore urged that the conviction of the Respondent was based upon conduct for which he was tried upon as misdemeanors and which conduct was necessary as elements in the charge of manslaughter by automobile.

Three major cases raised by the Petitioners in support of their objections were Bacon v. Sullivan, 200 F. 2d 70 (5 Cir. 1952), cert. denied, 345 U.S. 910 73 S. Ct. 651, 97 L.Ed. 1345 (1953); Cutshall v. State, 191 M. 765, 4 so. 2d 289 (Miss. 1941) and State v. Stewart, 223 N.W. 2d 250 (1974), cert. denied, 423 U.S. 902, 96 S. Ct. 205, 46 L.Ed. 2d 134. In Bacon v. Sullivan, Supra, the Court analyzed the double jeopardy clause by indicating that the same act may constitute an offense against two separate statutes if additional elements of proof are required for conviction on the latter count. In the Magistrates Report, it was clearly indicated that the Mississippi Supreme Court has construed that manslaughter by automobile requires: "... criminal negligence, which must be wanton or reckless under circumstances implying danger to human life or limb...", *id.* at A-11. The Respondent strongly urges that the analysis in Bacon v. Sullivan, Supra, is totally different from the elements of proof required in Respondent's case in that as Respondent previously pointed out that the State's In-

struction included all of the misdemeanor convictions as elements. It states in part:

"...o) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety or human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway 35N while his operator's license had been revoked or suspended and striking a vehicle in which the deceased was a passenger with the vehicle operated by Defendant then you shall find the Defendant guilty of manslaughter..." (Petitioners' A-12., A-13)

The State's Instruction continued:

"If the State has failed to prove any one or more of these elements beyond a reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty." (Petitioners' A-12, A-13).

It is thus, again urged that in the instant case, manslaughter by automobile in violation of Section 97-3-47 cannot be proved without at the same time proving reckless driving in violation of Section 63-3-1201, and that the conduct of Respondent that constituted reckless driving -- losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle -- is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction.

In a second case raised by the Petitioners, Cutshall v. State, Supra, the case involved only one similar factual situation which was that the driver was driving under the influence of intoxicating liquor. This case clearly has a different factual basis from the instant case which used the misdemeanor conduct to establish the culpable negligence necessary for the manslaughter conviction.

The Court in that case further held that "... one may violate the law and yet not be culpable negligent in fact." This is a clear indication that in the instant case, as the State indicated in its Instructions to the Jury, other

elements of negligence and recklessness were necessary to prove culpable negligence. The Respondent urges that the Magistrate's findings that the conduct covered by the Misdemeanor charges was the same as that used to establish the culpable negligence necessary to establish a manslaughter conviction in the instant case is a correct statement of the law.

A third case raised by the Petitioners, State v. Stewart, Supra, is totally different as to its factual and legal basis. The Iowa case cited is based upon law in the State of Iowa which has no vehicular homicide statute. (Stewart, Supra.) . Because Iowa has no statute covering this offense, it is urged that the findings in that case which rambled through cases and statements from Am. Ju. 2d and C.J.S. can be clearly distinguished from the instant case which has a statutory basis and a Judicial veneer requiring a showing of a culpable negligence which argument was adequately dealt with by the Magistrate in his Report and Recommendations. (Petitioners' A-1, A-2, A-3, A-4).

In attempting to discredit the Magistrate's Report and Recommendations, the Petitioners tried to create the impression the Magistrate based his complete findings upon Illinois v. Vitale. 447 U.S. 410. 65 L.Ed. 2d 228. 100 S. Ct. 2260 (1980). The Respondent directs the Court's attention to the Magistrate's comments in his Report and Recommendations at "A-2" wherein he states that "Guidance on this contention is found in Illinois v. Vitale..." [Emphasis added]. In the Vitale case, Supra.. there was a mere possibility that the State would rely on the ingredients included in the traffic offenses, whereas in the instant case, if the State had failed to prove any one or more of these elements, according to its own Instruction (S-1), the Petitioner would have been found not guilty. In the instant case, the traffic ingredients

were necessary to establish culpable negligence and therefore, a conviction.

The further issues raised by Respondents in State v. James, 606 P. 2d 11101 (N.M. App. 1979) and State v. Tanton, 88 N.M. 333, 337, 540, p. 2d 813, 817 (1975) involving jurisdictional matters are irrelevant to the matters and issues raised in the instant case since no jurisdictional matters were ever raised by the Respondent.

None of the cases raised by the Respondents in their Brief relate to legal decisions and issues involving involuntary manslaughter with a motor vehicle requiring by statute or judicial veneer, a showing of culpable negligence to sustain a conviction.

Additionally, prosecution of the Respondent on the manslaughter charge violated his right to due process of law under the Fourteenth Amendment. Blackledge v. Perry, 417 U.S. 21, 40 L.Ed 2d 628 (1974), which established a per se rule that a criminal defendant's right to due process is violated by the State substituting a felony charge for a misdemeanor charge covering the same conduct after the defendant exercised his right under state law to appeal and to trial de nova. The facts of this case fall squarely within Blackledge, under which Respondent is also entitled to relief.

CONCLUSION

The petition for Certiorari should not be granted.

Respectfully submitted,

Cleve McDowell

Cleve McDowell, Esq.
Attorney At Law
P.O. Box 1205
Cleveland, MS 38732

CERTIFICATE OF SERVICE

I, CLEVE MCDOWELL, attorney for Respondent,
do hereby certify that I have this day served a true and
correct copy of the foregoing Brief in Opposition to the
Writ of Certiorari to the following counsel:

Bill Allain, Attorney General
State of Mississippi

P. Roger Googe, Jr.
Counsel of Record
Assistant Attorney General

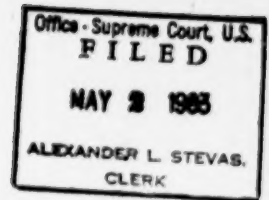
Larry M. Wilson
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

Attorneys for Petitioners

This, the 24 day of April, 1983.

Cleve McDowell

CLEVE MCDOWELL



NO. 82-1330

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

MORRIS THIGPEN, ET AL
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPER'S

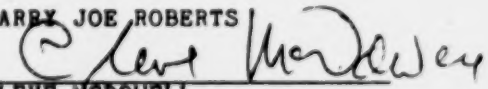
Comes now, BARRY JOE ROBERTS, Respondent herein,
and moves this Court for leave to proceed in forma pauper's
and in support of said Motion, would show unto the Court
as follows:

1. That the Respondent is unable to hire an attorney or pay the costs herein, to defend said action;
2. That the Respondent is unemployed.

Respectfully Submitted,

BARRY JOE ROBERTS

By:


CLEVE MCDOWELL
Attorney for Respondent

Cleve McDowell
Attorney at Law
P.O. Box 1205
Cleveland, MS 38732
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FORMA PAUPERIS AFFIDAVIT

I, hereby apply for leave to proceed herein without prepayment of fees or costs or giving security therefor. In support of my application, I state under oath that the following facts are true:

1. I am the Respondent in said matter and I believe that I am entitled to redress.
2. I am unable to prepay the costs of said action, or give security therefor.
3. I have no assets or funds which could be used to prepay the fees or costs.
4. I am unemployed.

BARRY JOE ROBERTS
BARRY JOE ROBERTS

Subscribed and sworn to before me this 26th day of April, 1983.

Dennette Threlwell
Notary Public

My Commission Expires:

4/9/84

CERTIFICATE OF SERVICE

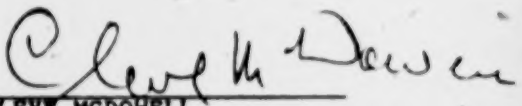
I, CLEVE MCDOWELL, attorney for Respondent, do hereby certify that I have this day served a true and correct copy of the foregoing Motion For Leave to Proceed In Forma Pauper's to the following counsel:

Bill Allain, Attorney General
State of Mississippi

P. Roger Googe, Jr.
Counsel of Record
Assistant Attorney General

Larry M. Wilson
Special Assistant Attorney General
P.O. Box 220
Jackson, MS 39205

This, the 26th day of April, A.D., 1983.


CLEVE MCDOWELL

SEP 8 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1330

In the Supreme Court of the United States

October Term, 1982

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

**ON PETITION FOR CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals applied the correct standard of review in holding that respondent Barry Joe Roberts, had a substantial double jeopardy claim under the United States Supreme Court's holding in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

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No. 82-1330

In the Supreme Court of the United States

October Term, 1982

MORRIS L. THIGPEN, COMMISSIONER, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Report and Recommendation and Orders of the United States District Court for the Northern District of Mississippi, which are unreported, are set out in the appendix to the Petition for Certiorari, pp. A1 to A6. The opinion of the United States Court of Appeals for the Fifth Circuit which is unreported, is set out in said appendix, pp. A7 through A13.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1982 (Petition for Certiorari, p. A7). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Miss. Code Anno. §§ 63-3-1201, 97-3-47 and 99-35-1 *et seq.* (1972) are the State's laws involved in this cause.

U. S. Constitution Amendment V provides in part that:

... Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb

U. S. Constitution Amendment XIV, Section One, provides in part that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

STATEMENT OF THE CASE

A. Summary of the Facts

The facts supporting the verdict of the jury herein as found by the Mississippi Supreme Court can best be summarized as showing that on August 6, 1977, at approximately 7:00 p.m., Mrs. Mary Ella Bonner was driving her pickup truck in a southerly direction on Mississippi State Highway 35 between Charleston and Batesville. Testimony showed that two (2) other persons were riding in the cab of the truck with her and that five (5) children were riding in the bed of the truck. Respondent was driving an automobile in a northerly direction on said highway and, as the two (2) vehicles approached

each other, respondent's automobile ran off the east side of the highway, came back upon it and collided with the Bonner truck in the southbound lane of travel. Brenda Gail Bonner, ten-year-old daughter of Mrs. Mary Ella Bonner, sustained a broken neck in the collision and expired at the same period.

Mrs. Louise Goad, who operated a store which dispensed alcoholic beverages, testified that, at approximately 5:30 p.m. on the date of the accident, respondent purchased a beer for himself and a companion and also a six-pack of beer to carry with them. She observed that respondent had been drinking excessively at the time and left the establishment at a high rate of speed.

Mr. E. J. Dunnigan, a former law enforcement officer, saw respondent at approximately 6:45 p.m. on said day, driving north on highway 35 at a high rate of speed, which he estimated to be approximately 90 miles per hour. He went to the scene of the accident, observed the position of the cars and debris, and that respondent's eyes were red. However, he did not testify that respondent was intoxicated.

Reverend W. T. Barkley and Margaret Barkley, his wife, were proceeding south on highway 35 directly behind Mrs. Bonner's truck before, and at the time of, the collision. He said that respondent's car ran off the highway, turned sideways, came back upon it, turned sideways again, and collided with the Bonner truck in the southbound lane. He walked over to respondent's car and indicated that "it smell like it was a beer truck wreck rather than a car." Mrs. Barkley corroborated her husband as to the details of the collision.

Mrs. Mary Ella Bonner testified that, as she was driving her truck south upon the highway, she saw re-

spondent's car approaching at an extremely high rate of speed, the car left the highway, swerved back upon it, went into a spin, and collided with her truck in the southbound lane of travel.

Trooper Thomas McLeod, of the Mississippi State Highway Patrol went to the scene for the purpose of investigating the collision. He detected the odor of alcohol on respondent, who was unstable in his walking, was glassy-eyed and appeared to be under the influence of alcohol. Officer McLeod ask him what he was drinking, and respondent replied, "well, I have been drinking beer all afternoon." McLeod was of the opinion that respondent's ability to operate a motor vehicle was impaired as a result of intoxication.

Respondent testified that he leaned over to pick up a tape for his tape player, which had fallen onto the floorboard, and, in doing so, lost control of the vehicle, which resulted in the collision.

B. Procedural History

Shortly after the collision, Trooper Thomas McLeod of the Mississippi Highway Patrol cited respondent for violating Miss. Code Anno. § 63-1-57 (1972), driving while license revoked, Miss. Code Anno. § 63-11-33 (1972), driving under the influence of intoxicating liquor, Miss. Code Anno. § 63-3-1201 (1972), reckless driving, and Miss. Code Anno. § 63-3-601 (1972), driving a vehicle on the wrong side of the road. On August 13, 1977, respondent appeared before the Honorable Sandra B. Johnson, Justice Court Judge for District One of Tallahatchie County and was found guilty of and sentenced on all four charges. On that same date respondent filed notice of and perfected appeal to the Circuit Court of Tallahatchie County pursuant to Miss. Code Anno. § 99-35-1 (1972).

On December 9, 1977, before the misdemeanor charges were heard *de novo* in the Circuit Court, respondent was indicted by the Tallahatchie County Grand Jury for manslaughter by culpable negligence.¹ In particular the indictment charged that on or about the 6th day of August, 1977, that Barry Joe Roberts did "unlawfully, willfully, and feloniously kill and slay one Brenda Bonner, a human being, by culpable negligence . . ." (A 1). On December 14, 1977, respondent was arraigned on the charge of manslaughter. On that date the Court consolidated the misdemeanor charges with the felony charge and set the matter for trial.

On Monday, May 28, 1978, the matter was called for trial. A jury was impaneled, and evidence detailing the aforesaid facts presented.

Just prior to the close of the State's case the following colloquy occurred:

BY MR. WILLIAMS: For the record, as the Court and Mr. Kellum may recall, in the preliminaries of this trial that's in progress, the Court ruled that Cause Numbers 4266, 4267, 4268, and 4269—

BY THE COURT: Wait just a minute. Did you waive the presence of your client here in chambers for this purpose?

1. Inasmuch as this case involves misdemeanor charges filed in the Justice of the Peace Court and a felony charge filed in the Circuit Court, it is important to note in light of the District Court's finding of vindictiveness in light of *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098 (1974), that in Mississippi under Miss. Code Anno. § 19-23-11 (1980) the County Prosecuting Attorney is charged with all criminal prosecutions before the various justice court judges and the county court, if the county has elected to provide for such, and under Miss. Code Anno. § 25-31-11 (1980) the District Attorney is to prosecute all criminal matters before the various grand juries and in the circuit courts. Practically speaking, county prosecuting attorneys handle all misdemeanor cases, and district attorneys handle all felony cases.

BY MR. KELLUM: Yes, sir.

BY THE COURT: Let the record so reflect. Go.

BY MR. WILLIAMS: Those four cause numbers which I just mentioned were appeals from misdemeanor convictions in JP Court, Beat One. The Court may recall it ruled for the purpose of trial that these matters would be consolidated with 4265, which is the case in progress. The State would now move the Court for leave to sever from Cause 4265 Cause Numbers 4266, 4267, 4268 and 4269, and for further authority to remand those four cause numbers to the file.

BY THE COURT: Does the Defendant interpose any objection to that?

BY MR. KELLUM: No objection.

BY THE COURT: Let the record so reflect.

(A95-96)²

The respondent then proceeded to present his witnesses and rested.

At the close of the evidence the Court in pertinent part instructed the jury on the substantive issue thusly:

S-1

The Defendant, BARRY JOE ROBERTS, has been charged by the Indictment with the crime of Manslaughter for having by his culpable negligence caused the death of BRENDA BONNER.

2. The Court of Appeals found that this was the equivalent to nolle prosequi.

If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence that

a) The deceased, BRENDA BONNER, was a living person; and

b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway No. 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the Deceased was a passenger with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter.

If the State has failed to prove any one or more of these elements beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty.

(A98-99)

S-2

Culpable negligence is as used in these instructions conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to wilfulness.

(A99)

D-1

The Court instructs the jury that "culpable negligence" as used in this case is negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, so clearly evidenced as to place it beyond every reasonable doubt and if, from the evidence or lack of evidence in this case you entertain a reasonable doubt as to the defendant's guilt (as to culpable negligence) then it is your sworn duty to find him not guilty.

(A99)³

On that same date the jury unanimously returned a verdict of guilty as charged, and on June 12, 1978, respondent was sentenced to serve a term of twenty (20) years with the Mississippi Department of Corrections. An appeal was taken to the Mississippi Supreme Court which affirmed the conviction on December 5, 1979. *Roberts v. State*, 379 So.2d 514 (Miss. 1979).

Respondent raised for the first time the question of double jeopardy in an Application to the Mississippi Supreme Court for Leave to File a Petition for a Writ of Error Coram Nobis on or about November 3, 1980. The application was denied without opinion, and the respondent on March 13, 1981, proceeded into the Federal arena.

On or about March 13, 1981, respondent filed a Petition for Writ of Habeas Corpus in the United States Dis-

3. Both the Supreme Court of Mississippi and this Court have repeatedly held that instructions must be read and considered as a whole. *Cowan v. State*, 399 So.2d 1346 (Miss. 1981); *Hutchinson v. State*, 391 So.2d 637 (Miss. 1980); *Henderson v. Kibbe*, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977).

trict Court, Northern District of Mississippi. The grounds assigned for relief were:

1. The trial court erred in permitting the petitioner to be indicted and tried upon a set of facts and circumstances which formed the basis for previous justice court charges for which the petitioner had been tried, convicted, and sentenced.
2. The trial court erred in vacating its order denying petitioner a special venire and later during the trial declaring that a special venire had in fact been given and petitioner's trial attorney was negligent in not objecting to same.
3. The trial court erred in permitting the State to consolidate the misdemeanor appeals and to receive evidence relating to same during trial of the related felony count and petitioner's trial attorney was grossly negligent in not objecting to same.
4. The legal representation of the petitioner at the trial level and at the initial appellate submission was grossly incompetent and prejudicially negligent and entitles the petitioner to a new trial.

On April 20, 1981, petitioners filed their Answer and Return denying that respondent was entitled to relief.

On November 3, 1981, the Magistrate filed his Report and Recommendation recommending that the writ issue. On December 8, 1981, petitioners filed objections to the Magistrate's Report and Recommendation and on January 18, 1982, Honorable L. T. Senter, Jr., Chief United States District Judge for the Northern District of Mississippi, filed his Order adopting the Magistrate's Report and Recommendation and granting respondent habeas corpus relief.

The Court of Appeals affirmed the District Court's judgment on November 16, 1982.

SUMMARY OF THE ARGUMENT

This matter is before the Court on a grant of certiorari to the United States Court of Appeals for the Fifth Circuit. The principal issue presented for consideration focuses upon the question of whether the indictment and prosecution of the respondent for manslaughter by culpable negligence subsequent to a conviction of reckless driving in justice of the peace court and an appeal with a right to a trial *de novo* raises a substantial claim of double jeopardy.

The arguments presented by the petitioners herein focus upon the office of the right to a trial *de novo* on appeal from a judgment of conviction in a justice court. Specifically, petitioners argue that there is a lack of mutuality between the elements of the offenses of manslaughter by culpable negligence under Miss. Code Anno. § 97-3-47 (1972) and reckless driving under Miss. Code Anno. § 63-3-1201 (1972). The substance of the arguments advanced by petitioners dwells upon the propositions that [1] an appeal with a right to a trial *de novo* voids the previous conviction and the defendant stands before the appellate court as if he had never been convicted [2] an analysis of the offense of reckless driving is predicated upon the manner in which one operates a motor vehicle upon the streets and highways of the State of Mississippi and is in no way dependent upon any resultant injury to persons or property. On the other hand, the crime of manslaughter by culpable negligence not only involves an unlawful homicide but is not restricted as to either instrumentality or location.

Consequently, petitioners submit that the Court of Appeals erred in affirming the grant of habeas, and the case should be reversed and remanded.

ARGUMENT

THE COURT OF APPEALS APPLIED AN INCORRECT STANDARD OF REVIEW WHEN IT HELD THAT ROBERTS HAD A SUBSTANTIAL DOUBLE JEOPARDY CLAIM UNDER THE UNITED STATES SUPREME COURT'S HOLDING IN ILLINOIS v. VITALE, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980)

A. Mississippi Procedure in Appeals of Criminal Convictions in Justice of the Peace Courts

Like the State of Kentucky in *Colten v. Kentucky*, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972), Mississippi provides for a trial *de novo* on appeal from a criminal conviction in a justice of the peace court. In *Calhoun v. City of Meridian, Mississippi*, 355 F.2d 209, 211 (5th Cir. 1966), the Court of Appeals cogently outlined the procedure for such appeals.

This section, 1202, as construed by the courts has little resemblance to conventional appeal statutes. On the filing of the appeal, the appeal supersedes the judgment of the justice of the peace and the case became triable in the circuit court *de novo*.

The Supreme Court of Mississippi has held that once a defendant in a criminal case elects to take a trial *de novo* he is powerless to dismiss the new trial and accept the earlier verdict instead. He stands in the circuit court in "the same attitude of a defendant as he did in the court of the Justice of the Peace and as such is impotent to dismiss the case."

In effect, the Supreme Court of Mississippi has held when an appeal is taken from a justice court, the judgment of the justice court is vacated.

When a cause is removed to the circuit court on appeal from a justice of the peace court, the jurisdiction acquired by the circuit court is not in any proper sense appellate. The circuit court in such cases, has no authority to merely review and affirm or reverse the judgment of the justice of the peace, but the case must be tried anew as if it were originally instituted in the circuit court, with the single exception that written pleadings are not required, and the jurisdiction to consider such cases *de novo* on appeal and decide them according to the law and evidence, independent of the ruling and judgment of the lower court is original and not appellate. (footnotes omitted)

See: Miss. Code Anno. §§ 99-31-1 et seq. (1972).

Although not specifically mentioned in *Calhoun*, a person charged with a misdemeanor violation in justice of the peace court may plead guilty and still obtain a trial *de novo* on appeal. *Niblett v. State*, 75 Miss. 105, 21 So. 799 (1897); *Jenkins v. State*, 96 Miss. 461, 50 So. 495 (1909); *Ball v. State*, 202 Miss. 405, 32 So.2d 195 (1947); *Little v. Wilson*, 189 Miss. 825, 199 So. 72 (1940).

Within the context of the question *sub judice*, it is interesting to note that in *Calhoun*, *supra*, the Court of Appeals held that for purposes under 28 U.S.C. § 1446(c) that petitions for removal after appeals from judgments of justice courts and before *de novo* trials in the appropriate appellate court were timely as filings before trial as contemplated by the statute.

Consequently, the threshold question concerns the effect of a trial *de novo* as it relates to the Double Jeopardy Clause. The answer seems to lie in *Colten*, *supra*.

While in principal part this Court's decision in *Colten*, *supra*, appeared to deal with the question of judicial vindictiveness in the context of the Due Process Clause as interpreted in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), the Court did discuss the application of the Double Jeopardy Clause. In addressing this question the Court emphasized several of the procedural provisions common to both Mississippi and Kentucky. Thus in denying *Colten*'s claim, the Court held:

Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The *Pearce* Court rejected the same contention in the context of that case, 395 U.S., at 719-720, 23 L.Ed.2d at 665, 666. *Colten* urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in *Pearce*, where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea. [emphasis added]

Colten, *supra* at 120.

Likewise, a defendant in Mississippi can bypass the inferior court, i.e., justice of the peace court, by pleading guilty and may thereafter erase any consequence thereof by merely appealing to the next higher level court.

The effect, therefore, of a right to a trial *de novo* wipes the slate clean, and a defendant stands in no worse position than he did before initial conviction in the justice court. Consequently, the Double Jeopardy Clause is simply inapplicable.

B. Reckless Driving Is Not Necessarily the "Same Offense" of Manslaughter by Culpable Negligence in Mississippi

To begin our discussion we note from the outset that Mississippi does not have a specific vehicular homicide statute. Instead, those cases like *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980), are prosecuted under Miss. Code Anno. § 97-3-47 (1972) which defines manslaughter in general terms as the "killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law" On the other hand, reckless driving is defined in Miss. Code Anno. § 63-3-1201 (1972) as the driving of "any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property"

In affirming the grant of the writ the Court of Appeals acknowledged that each of the offenses required proof of an element the other did not. In regard to the offense of reckless driving the Court held:

4. The Supreme Court of Mississippi has consistently defined the crime of manslaughter by culpable negligence to mean "negligence of a higher degree than that which in civil cases is held to be gross negligence, and must be negligence so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life, and that this shall be so clearly evidenced as to place it beyond every reasonable doubt." *Moore v. State*, 238 Miss. 103, 117 So.2d 489 (1960), and the cases cited therein.

To establish a violation of the reckless driving statute, one element not required to prove manslaughter must be established; operation of a motor vehicle. *Roberts v. Thigpen*, No. 82-4067, slip op. at 5 (5th Cir., Nov. 16, 1982).

Turning to the offense of manslaughter, the Court of Appeals had the following comments:

Of course, to establish manslaughter, an element not required to prove reckless driving must be shown: death of a person. *Id.*, at 5.

However, the Court in discussing the foregoing made the following statement which in light of the ultimate ruling below is somewhat puzzling.

A narrow focus on the two statutes provides one answer. Proof of manslaughter does not necessarily entail proof of reckless driving, for manslaughter could be proved in a situation completely foreign to vehicular collision. *Id.*, at 5.

Illinois v. Vitale, *supra*, involves strikingly similar facts. The respondent's automobile struck and killed two (2) children. A police officer at the scene issued a traffic citation charging respondent with failing to reduce speed to avoid an accident. The respondent was convicted and fined, and the State then charged him with involuntary manslaughter under the statute involved in the present case. The Supreme Court of Illinois held that the second prosecution was barred by the Double Jeopardy Clause of the Constitution. Noting that "[t]he sole question before us is whether the offense of failing to reduce speed to avoid an accident is the 'same offense' for double jeopardy purposes as the manslaughter charges brought against Vitale," *Id.*, at 415-416, this Court held:

The Blockburger test [*Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932)] focuses on the proof necessary to prove the statutory elements of each offense rather than on the actual evidence to be presented at trial. Thus [in *Brown v. Ohio*, 432 U.S. 161, 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977)] we stated that if "each statute requires proof of an additional fact which the other does not," . . . the offenses are not the same under the Blockburger test. *Vitale, supra*, at 416, 65 L.Ed.2d 228, 100 S.Ct. 2260, quoting 432 U.S., at 166, 53 L.Ed.2d 187, 97 S.Ct. 2221 (emphasis supplied by *Vitale* court).

This principle was amplified by example. *Brown v. Ohio, supra*, depended on the fact that a prosecutor who has established the offense of "joy riding" need only prove the requisite intent in order to establish auto theft, and "the prosecutor who has established auto theft necessarily has established joy riding as well." *Vitale, supra*, at 417, 65 L.Ed.2d 228, 100 S.Ct. 2260, quoting *Brown*, 432 U.S., at 168, 53 L.Ed.2d 187, 97 S.Ct. 2221. If proof of auto theft had not necessarily involved proof of joy riding, "the successive prosecutions would not have been for the 'same offense' within the meaning of the double jeopardy clause." 447 U.S., at 417, 65 L.Ed.2d 228, 100 S.Ct. 2260. The Court concluded, in a holding directly controlling in the case at bar:

[I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the Blockburger test. The mere possibility that the state will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. *Id.*, at 419, 65 L.Ed.2d 228, 100 S.Ct. 2260.

At this juncture, petitioners suggest, the Court of Appeals erred. Instead of relying strictly upon this Court's directive in *Blockburger* that there must necessarily be an overlay of the statutory elements, both the District Court and the Court of Appeals looked to the actual evidence that had to be presented at both trials and concluded therefrom that a Double Jeopardy violation had occurred. In particular the Court of Appeals held:

It is unnecessary to resolve this dilemma on the first prong of the analysis. Roberts unquestionably has such a "substantial claim" of double jeopardy under the second prong that his trial and conviction for manslaughter are precluded.

The focus here is on the evidence actually presented at trial. If the state had to prove reckless driving or had to rely on conduct necessarily involving reckless driving in order to prove manslaughter, Roberts has a substantial claim of double jeopardy under the fifth and fourteenth amendments of the United States Constitution. The same evidence that led to Roberts' conviction on the misdemeanor charge was also introduced in the manslaughter trial. The trial court's instructions to the jury leave no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter. (footnotes omitted)

Roberts v. Thigpen, supra, at 6-9.

The ruling in this case is quite confusing when compared to the holding in the case of *United States v. Cowart*, 595 F.2d 1023 (5th Cir. 1979). In discussing principally the same topic, the method by which determines whether two charges are the "same offense," the Court summarized the ruling thusly:

To determine whether defendant was subject to multiple punishment for the same offense, we look to the leading case of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), where the Supreme Court of the United States formulated the applicable standard.

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test of [sic] be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304, 52 S.Ct. at 182. See also *Brown v. Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); *Jeffers v. United States*, 432 U.S. 137, 151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977).

This standard frequently has been referred to as the "same evidence" test; however, the *Blockburger* test looks not to the evidence adduced at trial but focuses on the elements of the offense charged. *Brown v. Ohio*, 432 U.S. at 166, 97 S.Ct. at 2225 (*Blockburger* test emphasizes the elements of the two crimes); *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975) ("If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."); *United States v. Dunbar*, 591 F.2d 1190, 1193 (5th Cir. 1979) ("Application of the [*Blockburger*] test focuses on the statutory elements of the offenses charged."). An examination of the elements of the respective offenses of "conspiracy" and "aiding and

abetting" demonstrates that Cowart was convicted of two, separate and distinguishable offenses.

Id., at 1029-30.

Cf., *Ciucci v. Illinois*, 356 U.S. 571, 2 L.Ed.2d 983, 78 S.Ct. 839 (1958).

While there is little doubt that the evidence necessary to prove the charge of reckless driving was introduced to establish the second offense of manslaughter, such does not preclude the State of Mississippi prosecuting respondent on a charge of manslaughter or enforcing its judgment after conviction thereon.

An examination of the statutory offenses here involved reveals that each contains elements not common to the other. The offense of reckless driving is predicated upon the manner of operation of a motor vehicle and is in no manner dependent upon any resultant injury to persons or property. See: *Barnes v. State*, 249 Miss. 482, 162 So.2d 865 (1964); *Gause v. State*, 203 Miss. 377, 34 So.2d 729 (1948); *Sanford v. State*, 195 Miss. 896, 16 So.2d 628 (1944). The crime of manslaughter by culpable negligence, by contrast, not only involves an unlawful homicide, but is not restricted as to either instrumentality or location. *Gandy v. State*, 373 So.2d 1042 (Miss. 1979). See also: *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (1941). Consequently, there is an obvious lack of mutuality between the two offenses.

The cases decided by this Court are replete with the admonition that the lower courts, both State and Federal, are to look to the statutory elements of the first and second charges and not to the similarities or overlap of facts between the two cases. E.g., *Vitale, supra*; *Brown, supra*; *Iannelli v. United States*, 420 U.S. 770, 43 L.Ed.2d 616, 95 S.Ct. 1284 (1975). Otherwise, there is no reason why

the offenses of driving under the influence of intoxicating liquor, driving on the wrong side of the highway, and driving while one's license has been revoked would not fall within the same category. Cf., *Cutshall v. State*, 191 Miss. 764, 4 So.2d 289 (1941); *Scott v. State*, 183 Miss. 738, 185 So. 195 (1938); *Goudy v. State*, 203 Miss. 366, 35 So. 308 (1948).

Within the parameters of the instant matter one must recognize that there is a possibility that the State may on occasion seek to rely upon all of the ingredients necessarily included in the offense of reckless driving under Miss. Code Anno. § 63-3-1201 (1972) to establish an element in a case of manslaughter. However, such is not sufficient to preclude the prosecution of the latter. Inasmuch as each offense requires proof of an element not required in the other, they obviously do not meet the "same offense" or *Blockburger* test and, therefore, do not raise a substantial claim of double jeopardy.

CONCLUSION

In the final analysis respondent's claim of double jeopardy must fail under the line of authority cited herein. One cannot down play the role of a right to a trial *de novo* in an appeal from the justice court to the circuit court. As indicated *infra*, a right to trial *de novo* vacates or voids the previous conviction in the justice court, and the defendant stands before the appellate court clothed with a presumption of innocence. Consequently, when a defendant exercises his right to appeal, his previous conviction and sentence are rendered void and jeopardy has not attached.

Within this context one finds a compound flaw in the judgment of the Court of Appeals. Initially, if petitioner by appealing and affording himself of a right to trial *de novo*

voided his previous conviction of reckless driving and thereby vitiated his claims of double jeopardy, one must conclude that he was not subjected to double jeopardy in his trial in the Circuit Court since the State during the course of the proceedings dismissed all of the misdemeanor charges.

Alternatively, the Court of Appeals erred in applying the *Blockburger* test by looking not to the elements necessary to prove each charge but instead to the evidence actually admitted. Without question the same evidence would have been admitted at both trials since the two charges arose out of the same facts and circumstances. However, as demonstrated previously, there is a clear lack of mutuality between the elements of the two. Consequently, the finding of a "substantial claim of double jeopardy" must fail.

For these reasons, we ask the Court to reverse and remand the matter *sub judice*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William S. Boyd, III, a Special Assistant Attorney General for the State of Mississippi, and one of the attorneys for Petitioners, do hereby certify that I have this day caused to be served three (3) true and correct copies of the foregoing Brief for the Petitioners to the following:

Cleve McDowell, Esquire

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Post Office Box 1205

Cleveland, Mississippi 38732

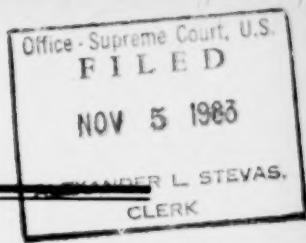
Attorney for Respondent

This, the 6th day of September, 1983.

/s/ WILLIAM S. BOYD, III

WILLIAM S. BOYD, III

NO. 82-1330



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

MORRIS L. THIGPEN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS, *et al.*,
Petitioners,

vs.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under the United States Supreme Court's holding in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed. 2d 228, 100 S. Ct. 2260 (1980) and under the Fifth and Fourteenth Amendments of the United States Constitution.

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OPINIONS BELOW

The Report and Recommendation and Orders of the United States District Court for the Northern District of Mississippi, which are unreported, are set out in the Appendix of the Petition For Certiorari at pages A1 to A6. The opinion of the United States Court of Appeals for the Fifth Circuit which is unreported, is set out in said Appendix at pages A7 through 13.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1982, (Petition for Certiorari, P. A7). The Jurisdiction of this Court rests on 28 USC §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Miss. Code Anno. § §63-3-1201, 97-3-47 and 99-35-1 et seq. (1972) are the State's laws involved in this cause.

U.S. Constitution Amendment V provides in part that:

. . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . .

U.S. Constitution Amendment XIV, Section One, provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

STATEMENT OF THE CASE

The Respondent sets forth the same Statement of the Case as is set forth in the Brief for Petitioners herein.

SUMMARY OF THE ARGUMENT

This matter is before the Court on a grant of certiorari to the United States Court of Appeals for the Fifth Circuit. The principal issue presented for consideration focuses upon the question of whether the indictment and prosecution of the respondent for manslaughter by culpable negligence subsequent to convictions for offenses which require proof of the conduct that constituted the culpable negligence necessary for the manslaughter conviction, i.e., losing control of his vehicle while driving under the influence, crossing the centerline and colliding with the other vehicles, raises a substantial claim of double jeopardy.

The substance of the argument advanced by the respondent is that the conduct necessary to establish the culpable negligence for the manslaughter conviction was the same conduct for which the respondent had been convicted in the Justice of the Peace Court and therefore constituted double jeopardy.

Consequently, the Respondent submits that the Court of Appeals was correct in affirming the grant of habeas and the case should be affirmed.

ARGUMENT

THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW WHEN IT HELD THAT ROBERTS HAS A SUBSTANTIAL DOUBLE JEOPARDY CLAIM UNDER THE UNITED STATES SUPREME COURT'S HOLDING IN *ILLINOIS V. VITALE*, 447 U.S. 410, 65 L. Ed. 2d 228 100 S. Ct. 2260 (1980).

Addressing the double jeopardy question, the District Court adopting the Magistrate's Report and Recommendation states:

"It is thus apparent that manslaughter by automobile in violation of Section 97-3-47 cannot be proved without at the same time proving 1201, and that conduct of Petitioner that constituted reckless driving — losing control of his vehicle while driving under the influence, crossing the centerline and colliding with the other vehicle — *is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction.*" [Emphasis Added] (A 117).

In objecting to the Magistrate's Report and Recommendation the Petitioners' stated:

"Section 63-3-1201 and the conduct before the accident are considered "traffic offenses" in Mississippi. Those offenses consist wholly of the conduct of an operation of a motor vehicle upon the highways of this State and do not involve a wrongful homicide, an element altogether lacking in the traffic offenses." (A117).

Here, the Petitioners appear to be saying that the Respondent could have been convicted of manslaughter by culpable negligence without introducing and relying upon relying upon the conduct of the Respondent in the operation of his vehicle

before the accident. In short, the Petitioners are arguing that the "traffic offenses" were not used by the State in the prosecution to establish the criminal negligence, which must be wanton or reckless under circumstances implying danger to human life, necessary for an involuntary manslaughter conviction with a motor vehicle in Mississippi as was set out in *Phillips v. State*, 379 So. 2d 318, 320 (Miss. 1980).

"The Defendant, **BARRY JOE ROBERTS**, has been charged by an Indictment with the crime of manslaughter for having by culpable negligence caused the death of **BRENDA BONNER**. If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, consistency with innocence, that (a) the deceased, **BRENDA BONNER**, was a living person; and (b) that she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the deceased was a passenger, with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter. If the State has failed to prove any one or more of these elements, beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, find the Defendant guilty" (A98, 99).

The State further by State's Instruction Number "2" clearly spelled out what the State considered "culpable negligence." That Instruction stated:

"Culpable negligence is, as used in these instructions, is conducted which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indif-

ference to the act under surrounding circumstances as to render his conduct tantamount to wilfulness." (A 99).

These two jury instructions clearly and unequivocally support the finding of the Magistrate. One of the misdemeanors of which Petitioner was convicted was reckless driving which is set out in Section 63-3-1301 of the Mississippi Code. It provides that:

"... That any person who drives any vehicle in such a manner as to indicate a wilful or wanton disregard for safety of persons or property is guilty of reckless driving."

In considering the Mississippi manslaughter statute, the District court found that:

Manslaughter is defined in general terms by Miss. Code Ann. Section 97-3-47 as "killing of a human being, by the act, procurement, or authority of law. . ."; with regard to manslaughter by automobile, the Mississippi Supreme Court has construed the statute to explain that "the gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence, which must be wanton or reckless under circumstances implying danger to human life, *Smith v. Smith*, 20, So. 2d 701, 704 (Miss., 1945), 'that is to say, in a wanton and flagrant disregard, automobile in violation of Section 63-3-121, and that the conduct of Petitioner that constituted reckless driving — losing control of his vehicle while driving, colliding with the other vehicle — is the same necessary for the manslaughter conviction. . .'" [Mag. rpt. and rec., P. 3]. (A 115 at A3 of Petition).

It is therefore urged that the conviction of the Respondent was based upon conduct for which he was tried upon as misdemeanors and which conduct was necessary as elements in the charge of manslaughter by automobile.

Three major cases raised by the Petitioners in support of their objections were *Bacon v. Sullivan*, 200 F.2d 70 (5 Cir. 1952), cert. denied, 345 U.S. 910 73 S. Ct. 651, 97 L.Ed. 1345 (A953); *Cutshall v. State*, 191 M. 765, 4 So. 2d 289 (Miss. 1941) and *State v. Steward*, 223 N.W. 2d 250 (1974), cert. denied, 423 U.S. 902, 96 S. Ct. 205, 46 L.Ed. 2d 134. In *Bacon v. Sullivan, Supra*, the Court analyzed the double jeopardy clause by indicating that the same act may constitute an offense against two separate statutes if additional elements of proof are required for conviction on the latter count. In the Magistrates Report, it was clearly indicated that the Mississippi Supreme Court had construed that manslaughter by automobile requires: “. . . criminal negligence, which must be wanton or reckless under circumstances implying danger to human life or limb. . .”, *id.* at A3 of Petition. The Respondent strongly urges that the analysis in *Bacon v. Sullivan, Supra*, is totally different from the elements of proof required in Respondent's case in that as Respondent previously pointed out that the State's Instruction included all of the misdemeanor convictions as elements. It states in part:

“ . . . b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety or human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway 35N while his operator's license had been revoked or suspended and striking a vehicle in which the deceased was a passenger with the vehicle operated by Defendant then you shall find the Defendant guilty of manslaughter. . .” (A 99)

The State's Instruction continued:

"If the State has failed to prove any one or more of these elements beyond a reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty." (A 99).

It is thus, again urged that in the *instant case*, manslaughter by automobile in violation of Section 97-3-47 cannot be proved without at the same time proving reckless driving in violation of Section 63-3-1201, and that the conduct of Respondent that constituted reckless driving — losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle — is the same conduct that constituted the *culpable negligence necessary for the manslaughter conviction*.

In a second case raised by the Petitioners, *Cutshall v. State, Supra*, the case involved only one similar factual situation which was that the driver was driving under the influence of intoxicating liquor. This case clearly has a different factual basis from the instant case which used the misdemeanor conduct to establish the *culpable negligence necessary for the manslaughter conviction*.

The Court in that case further held that "... one may violate the law and yet not be culpable negligent in fact." This is a clear indication that in the *instant case*, as the State indicated in its Instructions to the Jury, other elements of negligence and recklessness were necessary to prove culpable negligence. The Respondent urges that the Magistrate's findings that the conduct covered by the Misdemeanor charges was the same as that used to establish the culpable negligence necessary to establish a manslaughter conviction in the instant case is a correct statement of the law.

A third case raised by the Petitioners, *State v. Steward, Supra*, is totally different as to its factual and legal basis. The Iowa case cite is based upon law in the State of Iowa which has no vehicular homicide statute. (*Stewart, Supra.*). Because Iowa has no statute covering this offense, it is urged that the findings in that case which rambled through cases and statements from Am. Jr. 2d and C.J.S. can be clearly distinguished from the instant case which has a statutory basis and a Judicial veneer requiring a showing of a culpable negligence which argument was adequately dealt with by the Magistrate in Report and Recommendations. (A 1, 2, 3, 4, of Petition).

In attempting to discredit the Magistrate's Report and Recommendations, the Petitioners tried to create the impression the Magistrate based his complete findings upon *Illinois v. Vitale*, 447 U.S. 410. 65 L.Ed. 2d 228 100 S. Ct. 2260 (1980). The Respondent directs the Court's attention to the Magistrate's comments in his Report and Recommendations at "A-2" wherein he states that "Guidance on this contention is found in *Illinois v. Vitale*. . . ." [Emphasis Added]. In the *Vitale* case, *Supra.*, there was a mere possibility that the State would rely on the ingredients included in the traffic offenses, whereas in the instant case, if the State had failed to prove any one or more of these elements, according to its own Instruction (S-1), the Petitioner could have been found not guilty. In the instant case, the traffic ingredients were necessary to establish culpable negligence and therefore, a conviction.

None of the cases raised by the Respondents in their Brief relate to legal decisions and issues involving involuntary manslaughter with a motor vehicle requiring by statute or judicial veneer, a showing of culpable negligence to sustain a conviction.

Since the granting of habeas in this case, the State of Mississippi has recognized that its prosecution herein is flawed and has enacted a manslaughter by vehicle statute. That statute, which is known as the "Drunk Driving Law," was passed as House Bill No. 182, Chapter 466, (1983) and at Section 13, states:

Every person who operates any motor vehicle in violation of the provisions of subsection (1) of Section 63-11-30 and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose, or any other limb or member of another shall, upon conviction, be guilty of a felony and shall be committed to the custody of the State Department of Corrections for a period of time not to exceed five (5) years."

It should be noted that this law only carries a five (5) year maximum sentence whereas the culpable negligence statutes provide for a maximum sentence of twenty (20) years which is what the respondent received in the instant case.

Additionally, prosecution of the Respondent on the manslaughter charge violated his right to due process of law under the Fourteenth Amendment. *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed. 2d 628 (1974), which established a per se rule that a criminal defendant's right to due process is violated by the State substituting a felony charge for a misdemeanor charge covering the same conduct after the defendant exercised his right under state law to go to appeal and to trial de nova. The facts of this case fall squarely within *Blackledge*, under which Respondent is also entitled to relief.

CONCLUSION

The grant of habeas should be affirmed.

Respectfully submitted,

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Certificate of Service

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CLERK

NO. 82-1330

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

MORRIS L. THIGPEN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF
CORRECTIONS, ET AL

Petitioners

vs.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE SUPPORTING
ORAL ARGUMENT TO BE PRESENTED ON
INVITATION FROM THE COURT IN SUPPORT
OF THE JUDGMENT BELOW
IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

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This Brief supports oral argument that will be presented pursuant to this Court's Order of December 5, 1983, which provides in part:

It appearing that respondent is not represented by a member of the Bar of this Court, it is ordered that Rhesa H. Barksdale, Esquire, of Jackson, Mississippi, is invited to present oral argument as amicus curiae in support of the judgment below.

STATEMENT OF THE CASE

Petitioner's statement of the case appears accurate, except in minor detail not material here. As Petitioners indicate, their summary of the facts is for the most part quoted from the Opinion of the Mississippi Supreme Court affirming Roberts' manslaughter conviction (Pets. Brief 2; see J.A. 14-16).

As discussed infra at 57-58, it appears that the County Attorney who pressed the Justice Court misdemeanor

charges also assisted in prosecuting the felony charge in Circuit Court.

SUMMARY OF ARGUMENT

The Fifth Circuit correctly applied the standard set forth in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct.2260 (1980), for the evaluation of double jeopardy claims after a second trial. Vitale draws a distinction between statutory analysis of double jeopardy claims on interlocutory appeal, and factual analysis of such claims after the conclusion of a second trial. Vitale expressly authorizes a look beyond the statutes to the factual ingredients of the State's legal theory at the second trial. The Court said Vitale would have a substantial double jeopardy claim if:

to sustain its manslaughter case the State [finds] it necessary to prove a failure to slow or to rely on conduct necessarily

involving such failure. 447
U.S., at 420.

The Fifth Circuit found here that the
trial court's instructions to the jury

leave no room for doubt that
Mississippi did indeed rely on
and prove reckless driving as
the culpable act of negligence
necessary to prove manslaughter.
(Cert. Petn. A12-A13).

Petitioners claim Roberts was not
placed in double jeopardy because, in some
hypothetical other case, another defendant
might be convicted of manslaughter in an
offense not involving an automobile.
Petitioners claim that statutory language,
and nothing more, is the guide to
resolving all double jeopardy claims.

While statutory analysis may be
suited to interlocutory review when the
facts at the second trial have not yet
been established, once the State has
exposed the factual ingredients of its
legal theory in the second prosecution,

those ingredients must be considered. The Double Jeopardy prohibition in a successive prosecution case not only protects against prosecutions not intended by the legislature, it also protects against repeated prosecutions that give the prosecutor a chance to sharpen his case through repeated use of identical elements of proof.

In evaluating double jeopardy claims after a second trial, this Court has frequently looked beyond statutory language to determine the ingredients of the prosecutor's case. The statement in Vitale on which the Fifth Circuit relied accurately reflected prior law.

Courts subsequently citing Vitale have followed that statement and recognized that the evaluation of a double jeopardy claim after a second conviction necessitates consideration of more than

just the statutory language. There is no conflict in the lower courts on this meaning.

Petitioners' suggestion that double jeopardy analysis should always be limited to the arid parsing of statutes based on hypothetically conjured facts would substantially constrict the protection of the Double Jeopardy Clause. Petitioners have shown no basis in either law or policy to support the radical shift in double jeopardy law they propose.

Petitioners cannot now contend that Roberts' requesting a trial de novo precludes application of the Double Jeopardy Clause. Petitioners did not raise this issue in the District Court, the Court of Appeals, or in the Petition for Certiorari.

In any event, the right to trial de novo in the Circuit Court did not, under

the circumstances of this case, defeat the attachment of jeopardy. Roberts had a right to trial de novo on the misdemeanors. He attempted to exercise that right, but the State remanded those charges to the file. The State prosecuted him instead on a new manslaughter charge for which he was convicted and sentenced. The State thus subjected Roberts, like the defendant in Vitale, to two trials on different charges for the same offense. This is not a case like Colten v. Kentucky, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972), erroneously relied upon by Petitioners, where the State granted a trial de novo and did not initiate new charges at the second trial.

In the alternative, the judgment should be affirmed on due process grounds under Blackledge v. Perry, 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098 (1974). This

issue was raised below and can be presented here in support of the judgment of the Court of Appeals. Here, as in Blackledge, the defendant who appealed a misdemeanor conviction seeking a trial de novo was then prosecuted for a felony. Blackledge held that this per se denied Due Process because of the danger of prosecutorial vindictiveness. Petitioners seem to suggest that Blackledge is distinguishable because there were two prosecutors in this case. This contention, however, is not supported by the record, which shows the County Attorney also appeared in Circuit Court, as the pertinent State law permitted him to do. In any event, the risk of institutional vindictiveness is the same no matter how many prosecutors were involved.

In the further alternative, the writ should be dismissed as improvidently granted.

ARGUMENT

I. The Fifth Circuit Correctly Applied the Standard Set Forth in Illinois v. Vitale for the Evaluation of Double Jeopardy Claims After a Second Trial.

Petitioners argue erroneously that Vitale constricts the evaluation of every double jeopardy claim to nothing more than an arid parsing of statutes based upon hypothetically conjured facts.

This argument ignores the language and holding of Vitale. It fails to note the critical distinction Vitale draws between statutory analysis of double jeopardy claims on interlocutory appeal, and factual analysis of such claims after the conclusion of a second trial. Vitale expressly authorizes a look beyond the

statutes to the ingredients of the legal theory relied on at a second trial.

Petitioners' argument runs contrary to the precedents of this Court which have repeatedly looked beyond statutes to indictments, bills of particulars, and even evidence in evaluating double jeopardy claims. Petitioners argue for a rule that no state or federal court has ever drawn from Vitale, and a rule that would substantially constrict the historic prohibition against double jeopardy.

- A. This Court in Vitale recognized that a different standard should be used for evaluating double jeopardy claims when a case is not on interlocutory appeal, but has been tried on the merits.

In the long history of double jeopardy, presentation of such claims on interlocutory appeal is a relatively new chapter. It was not until 1977, for

example, that this Court held that a federal defendant could present a double jeopardy challenge on interlocutory appeal because the guarantee is a guarantee "against being twice put to trial for the same offense." Abney v. United States, 431 U.S. 651, 661, 52 L.Ed.2d 651, 661, 97 S.Ct. 2034 (1977).

Vitale was an interlocutory appeal. There the Illinois courts held a conviction for failing to reduce speed barred a subsequent prosecution for involuntary manslaughter. This Court, 447 U.S. at 416, first quoted the test found in Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 309, 52 S.Ct. 180 (1932):

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses

or only one, is whether each provision requires proof of a fact which the other does not.

The Court in Vitale then relied on Iannelli v. United States, 420 U.S. 770, 785 n.17, 43 L.Ed.2d 616, 627, 95 S.Ct. 1284 (1975), which said the Blockburger test identified legislative intent and that it:

focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. 447 U.S. at 416.

The Vitale Court found that failure to reduce speed could be a lesser offense which required no proof beyond that necessary to prove the greater offense, involuntary manslaughter. The Court pointed out, however, that the State claimed it could prove involuntary manslaughter by means other than reliance upon the failure to reduce speed charge.

See 447 U.S., at 418-419 & n. 7. The Court held the State should have the opportunity to do so. It said:

The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. 447 U.S., at 419.

The Court thus remanded the case to the Illinois courts for prosecution. The Court went on to state, however, that a different method of review would apply following an actual trial:

In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma,

433 US 682, 53 L Ed 2d 1053, 97
S Ct 2912 (1977).

In Harris, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under In Re Nielsen, 131 US 176, 33 L Ed 118, 9 S Ct 672 (1889), a person who has been convicted of a crime having several elements

included in it may not subsequently be tried for a lesser-included offense--an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under Brown, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution. 447 U.S., at 420-421. (Emphasis added).

The Court thus drew a distinction between interlocutory appeals and appeals after a second trial. In interlocutory appeals where the State claims it can prove two offenses using different facts, double jeopardy does not bar prosecution per se. If, however, the State concedes it will use all the elements of one

offense to prove the violation of another, or if its proof at trial reflects such a legal theory, then the prosecution has placed the defendant in double jeopardy.

Vitale's comment concerning events at a second trial was dictum. The Court therefore properly phrased its statement in terms of the defendant having only a "substantial claim" of double jeopardy rather than prejudging the case. As discussed infra at 28-36, however, the lower courts have interpreted Vitale as expressing a standard for judging double jeopardy claims after a second trial. That interpretation is consistent with the prior holdings of this Court and other courts.

Petitioners state in the question presented that they wish the Court to decide whether or not this "substantial claim" test is in fact a valid double

jeopardy test. Petitioners' Brief, however, wholly fails to quote or even cite the controlling language from Vitale concerning appeals after a second trial.

- B. The Fifth Circuit correctly applied the Vitale standard for double jeopardy challenges after a second trial.
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In this case, the Fifth Circuit used the label "second prong" to refer to Vitale's statements concerning double jeopardy review after a second trial. It applied that "prong" and found that respondent had been tried twice for the same offense. It said:

Roberts unquestionably has such a "substantial claim" of double jeopardy under the second prong that his trial and conviction for manslaughter are precluded.

The focus here is on the evidence actually presented at trial. If the state had to prove reckless driving or had to rely on conduct necessarily involving reckless driving in order to prove manslaughter,

Roberts has a substantial claim of double jeopardy under the fifth and fourteenth amendments of the United States Constitution. The same evidence that led to Robert's conviction on the misdemeanor charge was also introduced in the manslaughter trial. The trial court's instructions to the jury leave no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter. (Footnotes omitted) (Cert. Petn. All-Al3).

The Fifth Circuit thus found present the precise elements the Vitale Court said would give rise to double jeopardy.

Petitioners concede here that the same evidence was relied upon in both the misdemeanor and felony trials. (Pets. Brief 19). Indeed the court's charge to the jury makes it explicit that the misdemeanors were the only culpable acts relied upon by the State to establish manslaughter by culpable negligence. Petitioners have not urged any other

evidence upon which a finding of the culpable negligence necessary to prove manslaughter could have been based.

Petitioners thus cannot even make the claim offered by Illinois in Vitale. They cannot claim that they will prosecute this defendant on separate ingredients of proof. The trial has already taken place and the ingredients were the same. Petitioners' argument is that, in some other case, the culpable negligence element could be proven, without showing reckless driving or other misdemeanor offenses upon which Roberts' manslaughter conviction was based. Such speculation, however, is now hypothetical conjuring. The Fifth Circuit correctly applied Vitale

and affirmed the grant of the writ of habeas corpus.¹

- C. In evaluating double jeopardy claims after a second trial, this Court has repeatedly looked beyond statutory language to determine the ingredients of the prosecution's case.

Petitioners' claim, that this Court should restrict its review to an arid

¹The Fifth Circuit also suggested that the "judicial veneer" given the manslaughter statute by Mississippi courts, e.g. Smith v. State, 197 Miss. 802, 20 So.2d 701, 704 (1945), made it a manslaughter by automobile statute which was necessarily inclusive of the misdemeanor automobile offenses under Blockburger. The Court was correct in looking to this veneer. See Vitale, 447 U.S., at 416-417. Where the Court, however, has available to it the "evidentiary veneer" applied by the State in an actual prosecution, it need not rely on the prior "statutory veneer" applied by judges.

parsing of statutes on hypothetically
conjured facts, is directly contrary to a
long line of precedents in this Court.
Vitale's comment concerning the use of
evidence at a second trial stated the law.
It did not change the law.²

²See C. Antieau, Modern
Constitutional Law §§5:25, 5:28 (1969); 21
Am.Jur.2d Criminal Law §276; ABA,
Standards for Criminal Justice 13-2.3(c)
(1980).

An examination of the state court
cases on which petitioners rely--all of
which pre-date Vitale--also illustrates
this point. In State v. Stewart, 223
N.W.2d 250 (Iowa 1974), the Court looked
to the evidence and held a prosecution for
reckless driving did not bar a prosecution
for manslaughter when the former could be
shown by speeding and running a stop sign
and the later by intoxication. In
State v. James, 606 P.2d 1101 (N.M. Ct.
App. 1979), rev'd on other grounds, 603
P.2d 715 (N.M. 1979), the Court looked to
the information and held that prior
prosecutions for reckless driving and
driving under the influence barred a
prosecution for homicide, distinguishing
State v. Tanton, 540 P.2d 813 (N.M. Sup.
Ct. 1975) in which there was no prior
(Cont'd.)

In the venerable case of In Re Nielsen, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889), the Court held that a trial for adultery after one for unlawful cohabitation constituted double jeopardy. The Court quoted the language of the two indictments and noted that the petitioner:

averred that the two indictments were found against him upon the testimony of the same witnesses, on one oath and one examination as to the alleged offense, covering the entire time specified in both indictments. 131 U.S., at 186.

(Cont'd.)

prosecution for reckless driving so that separate evidence was available to support the homicide charge. See also infra at 28-36. Tanton expressly approved this test:

"whether the facts offered in support of one [offense] would sustain a conviction of the other." 540 P.2d at 815, quoting Owens v. Abram, 58 N.M. 682, 274 P.2d 630 (1954). (Emphasis added).

James was reversed on a finding that jeopardy had not attached on the misdemeanor. 603 P.2d at 716.

The Court went on to quote the source of the Blockburger test, Morey v.

Commonwealth, 108 Mass. 433, 435 (1871).

It said:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." We think, however, that that case is distinguishable from the present. The crime of loose and lascivious association and cohabitation did not necessarily imply sexual intercourse, like that of living together as man and wife, though strongly presumptive of it. But be that as it may, it seems to us very clear that where, as in this

case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense. (Emphasis added). 131 U.S., at 188.

In Grafton v. United States, 206 U.S. 333, 51 L.Ed. 1084, 27 S.Ct. 749 (1907), the Court held that an acquittal for murder precluded a subsequent prosecution for killing without premeditation. The Court quoted the indictments and referred to the evidence. It said:

But if not guilty of homicide, as defined in the latter section of the Penal Code,--and such was the finding of the court--martial,--he could not, for the same acts and under the same evidence, be guilty of assassination, as defined in the former section of the Code. 206 U.S., at 349. (Emphasis added).

In Waller v. Florida, 397 U.S. 387, 25 L.Ed.2d 435, 90 S.Ct. 1184 (1970), the Court held that convictions for

obstruction of city property and
disorderly breach of the peace barred a
subsequent prosecution for grand larceny.

The Court noted:

It is conceded that this
information [charging grand
larceny] was based on the same
acts of the petitioner as were
involved in the violation of the
two city ordinances. 397 U.S.,
at 388. (Emphasis added).

The Court repeatedly emphasized the
importance of this concession in its
opinion. See 397 U.S., at 389-390. It
also reserved the possibility that the
defendant could later be prosecuted for
"offenses not embraced within the charges
against him in the municipal court." 397
U.S., at 395 n.6.

In Harris v. Oklahoma, 433 U.S. 682,
53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977), the
Court reversed a conviction for robbery
with firearms when the defendant had
previously been convicted of felony

murder. The Court noted the State's concession that:

"[I]n the Murder case, it was necessary for all the ingredients of the underlying felony of Robbery with Firearms to be proved. . . . 433 U.S., at 682 n.*.

It then held, quoting language from In Re Nielsen, that:

When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. 433 U.S., at 682.

Finally, in Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977), the Court held that a defendant who had pleaded guilty to a misdemeanor charge of joy riding could not be subsequently prosecuted for auto theft. The Court carefully noted the facts charged in the misdemeanor complaint and the felony

indictment and held that the second prosecution was barred. 432 U.S., at 162-163. The Court stated in a footnote:

Because we conclude today that a lesser included and a greater offense are the same under Blockburger, we need not decide whether the repetition of proof required by the successive prosecutions against Brown would otherwise entitle him to the additional protection offered by Ashe [v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970)] and Nielsen. 432 U.S., at 166 n.6.

In sum, this Court has repeatedly looked beyond statutory phrasing to the facts alleged in indictments or proved at trial in evaluating claims of double jeopardy. The claim is established if the necessary ingredients, or factual elements, of proof of one prosecution include all the necessary factual elements proved in the other prosecution.

One purpose of the Double Jeopardy Clause is to prevent the prosecutor from

developing his case through successive prosecutions at the defendant's expense. United States v. DiFrancesco, 449 U.S. 117, 129, 66 L.Ed.2d 328, 101 S.Ct. 426 (1980); Burks v. United States, 437 U.S. 1, 11, 57 L.Ed.2d 1, 9, 98 S.Ct. 2141 (1978). By looking beyond the statutes to the ingredients of proof, the Court's double jeopardy cases prevent the prosecutor from repeated use of identical elements of proof. This is a purpose wholly distinct from determining legislative intent, which this Court has said is the function of the Blockburger test on which Petitioners rely. See Iannelli v. United States, 420 U.S. 770, 785 n.17, 43 L.Ed.2d 616, 627, 95 S.Ct. 1284 (1975).

- D. The Courts citing Vitale have recognized that the evaluation of a double jeopardy claim after a second conviction necessitates consideration of more than just statutory language.
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Every federal court of appeals citing Vitale on this point has recognized that the evaluation of a double jeopardy claim after a second conviction necessitates consideration of more than just the statutory language. United States v. Middleton, 673 F.2d 31 (1st Cir. 1982) (evidence); Government of Virgin Islands v. Brown, 685 F.2d 834, 838-839 (3rd Cir. 1982) (jury instructions); Stephens v. Zant, 631 F.2d 397, 401 (5th Cir. 1980), reversed on other grounds _____ U.S. _____, 77 L.Ed.2d 235, 103 S.Ct. _____ (1983) (the record); United States v. Phillips, 664 F.2d 971, 1006 n.48 (5th Cir. 1981) (factual issues

resolved); United States v. Bendis, 681 F.2d 561, 563-565 (9th Cir. 1982) (factor analysis) (criticizing United States v. Brooklier, 637 F.2d 620, 624 (9th Cir. 1981); United States v. Puckett, 692 F.2d 663, 667-668 (10th Cir. 1982) (indictment and transcript).

The Sixth Circuit, after careful review of Vitale and Whalen v. United States, 445 U.S. 684, 63 L.Ed.2d 715, 100 S.Ct. 1432 (1980) concluded:

What the reviewing court must do now in applying Blockburger is go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail. Pandelli v. United States, 635 F.2d 533, 538 (6th Cir. 1980). (Emphasis added).

The Sixth Circuit has applied Pandelli both to reject and to uphold

double jeopardy challenges. See, United States v. Sutton, 700 F.2d 1078, 1081 (6th Cir. 1983); Pryor v. Rose, 724 F.2d 525 (6th Cir. No. 81-4501, January 6, 1984) (en banc).

Only two federal decisions appear to have specifically discussed the "substantial claim" language in Vitale. In one such case, United States v. Haggerty, 528 F.Supp. 1286 (D. Colo. 1981), the Court held that double jeopardy prohibited the prosecution of the defendants for participating in strike against the government after they had already been convicted of contempt. The Court quoted the "substantial claim" language of Vitale and stated:

In the instant case, there is no uncertainty as to proof; the government has already relied on and proven the elements of the lesser offense--\$1918(3), striking against the government--in order

to establish the technically greater offense of criminal contempt of a court order prohibiting strike activities. [18 U.S.C. §401(3)].

Accordingly, this latter prosecution under §1918(3) is barred by the double jeopardy clause. 528 F.Supp, at 1298.

In its analysis the Court referred to the government's complaint, its memorandum in support of the temporary restraining order, and the evidence at the contempt hearing. 528 F.Supp., at 1297. See also United States v. Abess, 532 F.Supp. 490, 492 (E.D. Mich. 1982).

Similarly, state courts discussing the "substantial claim" language in Vitale have recognized that the evaluation of double jeopardy claim after a second conviction requires consideration of more than just the statutory language.

In Carter v. State, 424 N.E.2d 1047 (Ind. Ct. App., 3d Dist. 1981), the Court upheld a double jeopardy challenge to

convictions for both reckless homicide and causing death by operating a motor vehicle while intoxicated. In a concurring opinion, Judge Staton sailed into the "Sargasso Sea" of double jeopardy. See Albernaz v. United States, 450 U.S. 333, 343, 67 L.Ed.2d 275, 284, 101 S.Ct. 1137, 1144-45 (1981). He said:

Sometimes, the statutes may appear distinct on their faces, but, when analyzed in conjunction with a particular legal theory, the statutes proscribe the "same offense." Vitale, supra, 447 U.S. at 420-21, 100 S.Ct. at 2267, 65 L.Ed.2d at 238.

* * *

When the legal theory the State asserts in support of the reckless homicide charge necessitates the proof of the defendant's intoxication, the offense of causing death while driving and being intoxicated becomes a lesser included offense of the greater offense, reckless homicide. As such, punishment for both is prohibited under the Double

Jeopardy Clause. 424 N.E.2d, at 1051.

Judge Staton rested this conclusion not only on Whalen and Vitale, but also on the Sixth Circuit's decision in Pandelli, supra.

Other state courts quoting the "substantial claim" language of Vitale have also recognized that the evaluation of a double jeopardy claim after a second conviction requires consideration of more than just statutory language. This is true not only in traffic cases, but also in bad check, contempt, and firearms cases.³

³ See State v. Dively, 92 N.J. 573, 458 A.2d 502 (1983) ("elements. . . relied upon"); State v. Griffin, 277 S.E.2d 77 (N.C. Ct. App. 1981) (stipulation as to state's proof); Day v. State, 163 Ga. App. 839, 296 S.E.2d 145, 147 (Ga. Ct. App. 1982) ("only way the state could prove"); (Cont'd.)

Going beyond the statutory analysis and looking at the legal theory upon which the State relies in a particular case as shown by the indictment, jury charge, and if necessary, evidence, has not resulted in license to commit mayhem on the highways, as is suggested by the National District Attorneys Association, Inc. in its amicus curiae Brief.

For example, the New Jersey Supreme Court has issued a directive to all municipal court judges to withhold actions on drunk driving accidents involving personal injuries until clearance to proceed has been obtained from the county prosecutor. State v. Dively, 92 N.J. 573,

(Cont'd.)

Yarbro v. State, 402 So.2d 599, 601 (Fla. Ct. App., 2d Dist. 1981) ("facts. . . identical"); Baker v. State, 425 So.2d 36 (Fla. Ct. App., 5th Dist. 1983) ("essential building blocks of proof").

458 A.2d 502, 511 (N.J. 1983). Such personal injury--particularly death--warns that a prosecutor may wish to bring charges for a greater offense and that care should be taken to avoid double jeopardy claims. This simple precaution places a miniscule burden on the State and yet prevents multiple prosecutions. In Mississippi, a statute has required since 1980 reports by the County Attorney to the District Attorney, concerning certain offenses. See Miss. Code Ann. §19-23-11(5) (Supp. 1983; App. B).

Also, a prosecutor can frequently rely on different elements of proof to support the greater charge. In People v. Reed, 92 Ill. App. 3d 1115, 48 Ill. Dec. 421, 416 N.E.2d 694, 698 (1981), the Court upheld a conviction for driving under the influence which followed a conviction for running a red light. It said:

[Here] we believe the conviction for driving under the influence is sustained by the breathalyzer results and admissions of defendant, rendering evidence of running the red light superfluous. Therefore, the present defendant does not have even a "substantial" double jeopardy claim. 416 N.E.2d at 700.

See also Commonwealth v. Spurgeon, 428 A.2d 189, 191 (Pa. Super. Ct. 1981).

The prosecutor amici offer no proof that these techniques are insufficient to protect the public interest in prosecuting drunk drivers.

E. Limiting double jeopardy to statutory analysis of hypothetical facts would substantially constrict the historic protection against double jeopardy.

Petitioners' attempt to totally divorce statutes from facts easily leads to non-sensical results.

In Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1034, 97 S.Ct. 2912 (1977), the

Court reversed on double jeopardy grounds a conviction for robbery with firearms because the defendant had previously been convicted of felony murder. The Court noted the State's concession that "all the ingredients" of robbery with firearms were necessary for the State to prove its murder case. 433 U.S., at 682 n.*.

In Whalen v. United States, 445 U.S. 684, 63 L.Ed.2d 715, 100 S.Ct. 1432 (1980), the Court noted that six different felonies could provide a basis for felony murder in the District of Columbia, but that:

In the present case, however, proof of rape is a necessary element of proof of the felony murder. . . . 445 U.S., at 694.

Under Petitioners' theory in this case, the result in Harris and Whalen were erroneous because some other underlying

felony could hypothetically have been used to prove felony murder.

Similarly, it could have been argued in Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977) that because the defendant could hypothetically have gone joy riding in one car and then stolen another car, the offenses were not the same for double jeopardy purposes.

In short, the rule for which Petitioner argues would permit conjured facts to defeat an otherwise valid double jeopardy claim. This was not the purpose of Vitale. The thrust of the Vitale decision is to give the State a chance to prove independent facts at trial. Nothing in Vitale or any other decision can be read to say that the State can ignore that opportunity with impunity.

This case is a rare case. For whatever reasons, the State of Mississippi

prosecuted respondent for four misdemeanors and then used each of those same misdemeanors, and nothing else, to prove culpability in a prosecution for manslaughter by automobile. If the State had charged respondent in a single proceeding and prosecuted him there for three of the misdemeanors and instructed the jury that it was relying on other evidence to establish culpable negligence, then no double jeopardy claim would be presented.

For these reasons, the Court should affirm the Fifth Circuit's decision that Roberts' trial placed him twice in jeopardy.

II. Petitioners Cannot Contend That Roberts' Requesting a Trial De Novo Precludes Application of the Double Jeopardy Clause, Because They Did Not Raise This Issue Below or in the Petition for Writ of Certiorari.

Following trial and conviction in Justice Court on misdemeanor charges, including reckless driving, Roberts appealed, seeking a mandatory trial de novo in Circuit Court. Miss. Code Ann. §99-35-1 (1972). Prior to such trial, Roberts was indicted for manslaughter for the same conduct; and the Circuit Court consolidated trial of the misdemeanor and felony charges. At trial the State was granted leave to sever the four misdemeanor charges from the felony charge and remanded them to the file.⁴ Following

⁴Petitioners state this occurred "prior to the close of the State's case";
(Cont'd.)

the Court instructing the jury only on the manslaughter charge, Roberts was convicted (J.A. 95-99).

The single question presented by the Petition for Writ of Certiorari was:

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under the United States Supreme Court's holding in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980).

Furthermore, the single reason presented why certiorari should be granted was

because the opinion of the United States Court of Appeals for the Fifth Circuit is contra to the law of double jeopardy as decided in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932). (Cert. Petn. 4).

(Cont'd.)

but the Record indicates only that trial was "in progress" (compare Pets. Brief at 5-6 with J.A. 95-96).

This Court's grant of certiorari did not include any additional questions to be considered. _____ U.S. _____, 77 L.Ed.2d 1315, 103 S.Ct. 2427 (May 31, 1983). However, the State now argues a second basis for overturning the decision below: that Roberts' trial de novo renders the Double Jeopardy Clause inapplicable, contending:

Consequently, the threshold question concerns the effect of a trial de novo as it relates to the Double Jeopardy Clause. The answer seems to lie in Colten [v. Kentucky, 407 U.S. 104 (1972)], supra.

* * *

The effect, therefore, of a right to a trial de novo wipes the slate clean, and a defendant stands in no worse position than he did before initial conviction in the justice court. Consequently, the Double Jeopardy Clause is simply inapplicable. (Pets. Brief 13-14).

This Court's Rule 21.1(a) provides that

[t]he statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.

The trial de novo issue is not a "subsidiary question fairly included" within the question presented concerning Vitale. Neither the new trial de novo issue, nor Colten, are mentioned in the Petition for Writ of Certiorari. Furthermore, Petitioners have violated this Court's Rule 34.1(a), which provides that the Petitioners' "Brief may not raise additional questions or change the substance of the questions already presented"

It does not appear that this new issue was presented, or that Colten was even cited, to either the District Court

or the Court of Appeals.⁵ This Court has consistently upheld its Rule that it will not consider questions not presented in the Petition. Neely v. Eby Construction Co., 386 U.S. 317, 321 n.3, 18 L.Ed.2d 75, 80, 87 S.Ct. 1072 (1967); Irvine v. California, 347 U.S. 128, 129-130, 98 L.Ed. 561, 567, 74 S.Ct. 381 (1954); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 177-179, 82 L.Ed. 1273, 1274-1276, 58 S.Ct. 849 (1938). As discussed infra, this is especially true where the issue was not

⁵ See the Answer and Return to Petition for Writ of Habeas Corpus (J.A. 87-89), the Magistrate's Report and Recommendation (Cert. Petn. A1-A4), the Objection to Magistrate's Report and Recommendation (J.A. 116-132), the Petitioner's Brief on appeal to the Fifth Circuit (submitted to the Clerk of the Court with the filing of this Brief to be lodged with the Record), and the Opinion of that Court (Cert. Petn. A7-A13).

raised below. Dorszynski v. United States, 418 U.S. 424, 431 n.7, 41 L.Ed.2d 855, 862, 94 S.Ct. 3042 (1974); Espinoza v. Farah Manufacturing Co., 414 U.S. 86, 96 n.9, 38 L.Ed.2d 287, 295, 94 S.Ct. 334 (1973).

Aside from whether the issue was presented in the Petition, this Court has stated consistently that it will not decide an issue not raised below unless there are "exceptional circumstances." United States v. Lovasco, 431 U.S. 783, 788 n.7, 52 L.Ed.2d 752, 758, 97 S.Ct. 2044 (1977); Duignan v. United States, 274 U.S. 195, 200, 71 L.Ed. 996, 1000, 47 S.Ct. 566 (1927). See, e.g., NLRB v. Sears Roebuck & Co., 421 U.S. 132, 165, 44 L.Ed.2d 29, 55-56, 95 S.Ct. 1504 (1975); Tacon v. Arizona, 410 U.S. 351, 352, 35 L.Ed.2d 346, 348, 93 S.Ct. 998 (1973); Ramsey v. United Mine Workers, 401 U.S.

302, 311-312, 28 L.Ed.2d 64, 71-72, 91 S.Ct. 658 (1971); Adickes v. Kress & Co., 398 U.S. 144, 147 n.2, 26 L.Ed.2d 142, 148, 90 S.Ct. 1598 (1970); and Tyrrell v. District of Columbia, 243 U.S. 1, 61 L.Ed. 557, 37 S.Ct. 361 (1917). No "exceptional circumstances" exist that should cause this Court to consider this new issue.

III. The Right to Trial De Novo in Circuit Court Did Not Defeat The Attachment of Jeopardy.

The new trial de novo issue should not be considered. But even if it is, it is without merit. Petitioners argue that the Double Jeopardy Clause is inapplicable because the right to trial de novo "wipes the slate clean." (Pets. Brief 14). This argument is based upon the following language from Colten:

Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. . . .

The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea.
407 U.S., at 119; 32 L.Ed.2d, at 595 (Pets. Brief 13; emphasis by Petitioners).

Petitioners rely upon the above emphasized dictum to jump to the contention that "[l]ikewise, a defendant in Mississippi can bypass the inferior court . . . by pleading guilty and may thereafter erase any consequence thereof by merely appealing to the next higher level court." (Pets. Brief 13).

Petitioners overemphasize the significance of this dictum. Surely the Court was not suggesting that a defendant who maintains his innocence, as Roberts did, should plead guilty in order to avoid the harassment and dangers of double jeopardy in cases similar to this.

In any event, the Colten statement concerning trial de novo simply does not apply here. In this case, respondent's second trial was not a trial de novo on the misdemeanors. Rather, it was at its conclusion nothing more than a second prosecution, this time on enhanced felony charges. Respondent was subjected to enhanced charges, not just an increased sentence.

In Colten, the defendant sought only a trial de novo. The State gave him a trial de novo on the original charges and that was all the State gave him. He was tried and convicted again on the original charges against him. The "slate" at the second trial was "clean" because the charges were identical to those previously vacated.

Here Respondent did not receive a trial de novo on the original charges, and

so his request for such a trial is irrelevant. He sought a trial de novo but the State remanded the misdemeanors to the file. The first proceeding was thus concluded in his favor without completion of a de novo trial. Roberts' request for a trial de novo thus became immaterial to the outcome of the case.

The State, not Roberts, initiated the only charges presented to the jury at the second proceeding. The State indicted and tried Roberts for manslaughter. Roberts did not ask to be tried for manslaughter. Nor can he in any sense be said to have waived his right not to be charged for manslaughter after his conviction for the underlying misdemeanors. Any suggestion that he made such a waiver is a fiction "in the vein of the Mikado." North Carolina v. Pearce, 395 U.S. 711, 721 n.17, 23 L.Ed.2d 656, 667, 89 S.Ct. 2072

(1969) quoting King v. United States, 98 F.2d 291 (D.C. Cir. 1938).

Colten thus has no application here because Roberts' request for a trial de novo was irrelevant to the outcome of his case. The State mooted the request by remanding the charges to the file. The State then concluded the trial on a new charge initiated by the State. This placed respondent in the same position as the defendant in Vitale. He was forced to defend a felony charge after an earlier prosecution for lesser included misdemeanors.

This case thus bears some similarity to Breed v. Jones, 421 U.S. 519, 533, 44 L.Ed.2d 346, 357-358, 95 S.Ct. 1779 (1975) in which the Court held it to be a violation of Double Jeopardy for the State to try a defendant on juvenile charges and then dismiss that proceeding in favor of

trial as an adult. The Court's other cases concerning two-stage criminal proceedings all involve an appellate trial or hearing on the original charges and thus have no relevance here. See Ludwig v. Massachusetts, 427 U.S. 618, 49 L.Ed.2d 732, 96 S.Ct. 2781 (1976); Swisher v. Brady, 438 U.S. 204, 57 L.Ed.2d 705, 98 S.Ct. 2699 (1978); Justices v. Lydon, No. 82-1479.

IV. Alternatively, The Judgment of the Court of Appeals Should be Affirmed Pursuant to Blackledge v. Perry.

The judgment of the Fifth Circuit based upon a double jeopardy violation should be affirmed. Alternatively, the judgment should be affirmed on due process grounds under Blackledge v. Perry, 417 U.S. 21, 40 L.Ed.2d 628, 94 S.Ct. 2098 (1974).

The Magistrate recommended that Roberts' habeas petition be granted on both double jeopardy and due process grounds, relying on Vitale and Blackledge respectively (Cert. Petn. A1-A4). The District Court ruled "that the facts of this case fall squarely within Blackledge. . ." (Cert. Petn. A6).

The Fifth Circuit based its decision solely on double jeopardy grounds under Vitale, and did not reach the Blackledge due process issue. (Cert. Petn. A8 n.2).⁶

⁶The Court stated:

The district court found that a violation of due process constituted an alternative basis for habeas corpus relief. In so finding, the court relied on Blackledge v. Perry. . . for the proposition that the state may not substitute a felony charge for a misdemeanor charge which covers the same conduct after the defendant has been convicted of the misdemeanor and has exercised his

(Cont'd.)

- A. Respondent may urge the denial of due process as an additional ground in support of the judgment.

Roberts urges the Blackledge due process ground here as one of the bases for upholding the judgment (Resp. in Opp. to Cert. 8 and Brief 9.) Although the Blackledge due process issue is not a question which the writ of certiorari issued to review, the well established rule is that the respondent may "urge in support of a . . . [judgment] any matter appearing in the record although his argument may involve . . . insistence upon matter overlooked or ignored by" the lower

(Cont'd.)

right under state law to appeal and to trial de novo. Because we find Roberts' manslaughter conviction barred by the double jeopardy clause, we do not reach the Blackledge ground for the court's holding. (Emphasis added.)

court. United States v. American Railway Express Co., 265 U.S. 425, 435, 68 L.Ed 1087, 1093, 44 S.Ct. 560 (1924). (Emphasis added). See, e.g., Heckler v. Campbell, ____ U.S. ____, ____ n. 12, 76 L.Ed.2d 66, 75-76, 103 S.Ct. 1952 (1983); Hankerson v. North Carolina, 432 U.S. 233, 240 n.6, 53 L.Ed.2d 306, 314, 97 S.Ct. 2339 (1977); Dandridge v. Williams, 397 U.S. 471, 475 n.6, 25 L.Ed.2d 491, 496, 90 S.Ct. 1153 (1970); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 84 L.Ed. 849, 851, 60 S.Ct. 670 (1940); Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191, 81 L.Ed. 593, 597-598, 57 S.Ct. 325 (1937).

As demonstrated supra, the judgment should be affirmed on double jeopardy grounds. However, if the Court holds otherwise, then it should affirm the

judgment on Blackledge due process grounds.

B. Respondent's second trial on enhanced charges denied him due process under Blackledge v. Perry.

In Blackledge, the defendant, while in prison, fought with another prisoner and was charged with the misdemeanor of assault with a deadly weapon. After conviction, he appealed and sought a trial de novo. He was then indicted for the same conduct and charged with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury. This Court noted that the indictment "covered the same conduct for which [defendant] had been tried and convicted" in the inferior court. 417 U.S., at 23. Before this Court, Perry charged violations of both double jeopardy and due process. This Court addressed

only the due process claim. In imposing a per se prohibition against such increased charges after appeal, this Court stated:

The lesson that emerges from Pearce, Colten and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." Unlike the circumstances presented by those cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analagous to that of Pearce. We conclude that the answer must be in the affirmative. 417 U.S., at 27.

This Court pointed out in Blackledge that the rule it adopted did not bar trial de novo on the original charges, simply that it barred trial on the new charges brought after appeal was taken. Id., at 31 n.8. The bar imposed by Blackledge is

absolute,⁷ and a showing of vindictiveness by the State is not required. Id., at 28. For discussion by this Court of Blackledge, see United States v. Hollywood Motor Car Company, Inc., 458 U.S. 263, 73 L.Ed.2d 754, 102 S.Ct. 3081 (1982); United States v. Goodwin, 457 U.S. 368, 73 L.Ed.2d 74, 102 S.Ct. 2485 (1982).

Petitioners seem to suggest that there could be no vindictiveness because of the supposed separation of duties between the County Prosecuting Attorney

⁷The absolute rule adopted in Blackledge would not apply if the State "had shown that it was impossible to proceed on the more serious charge at the outset. . . ." 417 U.S., at 29, n.7. See also United States v. Goodwin, 457 U.S., at 370 n.8; 73 L.Ed.2d, at 78. Of course, no such showing can be made here. As the Petitioners concede, the same evidence presented at the Justice Court trial within seven days after the accident was utilized at the Circuit Court trial (Pets. Brief 19; J.A. 104-111, 90, 94-99).

and the District Attorney (see Pets. Brief 5 n.1). As noted, proof of vindictiveness is not required. Furthermore, this point does not appear to have been raised in either the District Court or Fifth Circuit (see J.A. 114, 116-132; Cert. Petn. A1-A4 and A7-A13; and Pets. Brief in Fifth Circuit). Accordingly, no definite evidence of such separation appears in the Record. In any event, as indicated infra n. 8, such separation here is highly questionable. For example, the County Attorney who apparently prosecuted the misdemeanor charges in Justice Court also represented the State at the manslaughter arraignment and apparently assisted the District Attorney at trial.⁸

⁸It is unclear what role the County and District Attorneys played in the
(Cont'd.)

Moreover, this Court's Opinion in

(Cont'd.)

Justice Court and Circuit Court trials, as well as in obtaining the manslaughter indictment. See Petitioners' Brief, at 5 n.1 concerning the roles played by Mississippi County and District Attorneys. Although the Petitioners conclude by stating that "[p]ractically speaking, county prosecuting attorneys handle all misdemeanor cases, and district attorneys handle all felony cases," neither the statutes cited by the Petitioners, nor the Record, support that statement.

Both apparently participated in the manslaughter trial. See J.A. 90 (indictment signed by District Attorney); 92 (County, not District, Attorney represented the State at the manslaughter arraignment); and 94 (the District and County Attorneys appeared at Circuit Court trial).

The State cites Miss. Code Ann. §§ 19-23-11 and 25-31-11 concerning the supposed felony and misdemeanor demarcation of the duties of the District and County Attorneys. The statutes in effect at the time of Roberts' trials in 1977 and 1978 (1972 Code; App. A to this Brief) were greatly amended in 1978 (1983 Supp. to Code; App. B to this Brief). When Roberts was tried, the County Attorney's duties included "assist[ing] the district attorney in all criminal cases in the circuit court. . . where the services of the district attorney are

(Cont'd.)

Blackledge does not suggest that its decision would have been different had more than one prosecutor been involved. For example, this Court stated that "a person convicted of an offense is entitled to pursue his statutory right to a trial de novo without apprehension that the State will retaliate by substituting a more serious charge for the original one. . . ." 417 U.S., at 28 (emphasis added).

(Cont'd.)

required in which. . . his county. . . is interested" and "represent[ing] the state in all matters coming before the grand jury of his county." Miss. Code Ann. § 19-23-11 (1972). Obviously, when Roberts was tried, the supposed felony and misdemeanor demarcation simply did not exist.

Pursuant to the statutes passed in 1978, effective January 1, 1980, even closer cooperation is mandated. See App. B, especially §19-23-11(5) concerning reports by the County Attorney to the District Attorney.

As a further example that the Blackledge prohibition does not hinge on the number of prosecutors involved, see Bordenkircher v. Hayes, 434 U.S. 357, 54 L.Ed.2d 604, 98 S.Ct. 663 (1978), where the Court stated that

there is no doubt that our Country's legal system vested in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. Id at 365. (Emphasis added).

Cf. Waller v. Florida, 397 U.S. 387, 393, 25 L.Ed.2d 435, 439, 90 S.Ct. 1184 (1970).

The absolute prohibition adopted in Blackledge mandates that the judgment below be affirmed.

V. In the Further Alternative, the Writ Should be Dismissed as Improvidently Granted.

Petitioners sought certiorari in this case alleging a conflict between the

decision of the Fifth Circuit below and this Court's decision in Vitale. In both the Petition and Brief on the merits, Petitioners wholly ignore the controlling language in Vitale upon which the Fifth Circuit relied. This omission was not pointed out to the Court in the response to the Petition for Certiorari. Petitioner does not claim a conflict with any post-Vitale case.

While Justices of this Court have dissented from denials of certiorari on Vitale issues, each of the dissents has been filed in a case involving interlocutory review of double jeopardy claims. See Illinois v. Zegart, 452 U.S. 948, 69 L.Ed.2d 961, 101 S.Ct. 3094 (1981); Rivera v. Ohio, 454 U.S. 973, 74 L.Ed.2d 211, 103 S.Ct. 271 (1982). Issues presented by interlocutory review are

simply not present on the facts of this case.

Finally, as noted in Roberts' Brief at 9, Mississippi has changed the statutory scheme upon which Petitioners rely. Mississippi recently enacted a statute which prescribes the penalty for manslaughter by automobile while driving under the influence of intoxicating liquor. Miss. Code. Ann. § 63-11-30 (Supp. 1983).⁹ That penalty is five

⁹Section 63-11-30 provides in pertinent part:

(1) It is unlawful for any person to drive or otherwise operate a vehicle within this state who (a) is under the influence of intoxicating liquor; (b) is under the influence of any other substance which has impaired such person's ability to operate a motor vehicle; or (c) has ten one-hundredths percent (.10%) or more by weight volume of alcohol in the person's blood. . . .

* * *

(Cont'd.)

years, the term apparently almost served by Roberts. Because Mississippi has changed its statutory scheme, it is unlikely that this case will repeat itself in Mississippi.

If the Court does not affirm the judgment below, it should dismiss the writ of certiorari as improvidently granted.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Fifth Circuit and hold that Roberts' second trial on enhanced charges placed him in Double

(Cont'd.)

(4) Every person who operates any motor vehicle in violation of the provisions of subsection (1) of this section and who in a negligent manner causes the death of another . . . shall, upon conviction, be guilty of a felony and shall be committed to the custody of the state department of corrections for a period of time not to exceed five (5) years.

Jeopardy, or, in the alternative, denied him Due Process.

In the further alternative, the Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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APPENDIX A

STATUTES CONCERNING DUTIES OF
DISTRICT AND COUNTY ATTORNEYS
IN EFFECT WHEN ROBERTS WAS
TRIED IN 1977 and 1978.

Section 19-23-11: Duties of County

Prosecuting Attorney

The county prosecuting attorney shall appear and represent the state in all investigations for felony before the various justices of the peace in his county. He shall also appear before justices and prosecute all cases against persons charged with carrying concealed weapons, unlawful retailing of intoxicating liquors, and the unlawful sale of cocaine, morphine and other drugs or other violations of state prohibition laws. He shall appear and represent the state in all habeas corpus trials of persons charged with capital offenses. He shall also advise and assist with reference to the prosecution of all other offenses which properly come before the justices of the peace of his county, appearing and prosecuting such cases whenever the same are contested, provided he can do so without neglecting the duties set forth in the first sentence of this section.

The county prosecuting attorney shall be the prosecuting attorney for the county court and he shall prosecute all state criminal cases therein, and he shall assist the district attorney in the prosecution of state criminal cases appealed from the county court to the circuit court.

The county prosecuting attorney shall assist the district attorney in all criminal cases in the circuit court and in all civil cases where the services of the district attorney are required in which the state, his county or any municipality of his county is interested. It shall be the duty of the county prosecuting attorney to represent the state in all matters coming before the grand jury of his county, and to approve or disapprove all accounts against the county before the same shall be allowed by the circuit court, but his approval or disapproval shall be subject to the ratification of the district attorney.

Section 25-31-11: Duties of District Attorney

It shall be the duty of the district attorney to appear in the circuit courts and prosecute for the state in his district

all criminal prosecutions and all civil cases in which the state or any county within his district may be interested; but if two or more counties are adversely interested, the district attorney shall not represent either. Any district attorney may also institute and prosecute to final judgment or decree any case in the name of the state against any person or corporation for any violation of the constitution or the laws of this state, in order to enforce any penalties, fines, or forfeitures imposed by law in any court of his district having jurisdiction, with like effect as if the suit was instituted by the attorney general.

APPENDIX B

STATUTES NOW IN EFFECT CONCERNING DUTIES OF DISTRICT AND COUNTY ATTORNEYS.

Section 19-23-11: Duties of County

Prosecuting Attorney

(1) The county prosecuting attorney shall appear and represent the state in all investigations for felony before the various justice court judges in his county. He shall also appear before justice court judges and prosecute all cases against persons charged with offenses therein. The county prosecuting attorney shall be the prosecuting attorney for the county court and shall prosecute all state criminal cases therein, and he shall represent the state in criminal cases appealed from the county court to the circuit court.

(2) The county prosecuting attorney may assist the district attorney in all criminal cases and in all civil cases where the services of the district attorney are required in which the state, his county or any municipality of his county is interested.

(3) The county prosecuting attorney may present any matter to the grand jury of his county.

(4) The county prosecuting attorney shall have full responsibility for all misdemeanors, youth court proceedings, uniform reciprocal enforcement of support agreement cases, and all other cases not specifically granted to the district attorney. Provided, however, that in any municipality having a municipal youth court, the municipal prosecutor shall have responsibility for youth court matters in that court.

Where any statute of this state confers a jurisdiction, responsibility, duty, privilege or power upon a county attorney or county prosecuting attorney, either solely, jointly or alternatively with a district attorney, such county prosecuting attorney shall be responsible for the prosecution, handling, appearance, disposition or other duty conferred by such statute. Any such provision shall not be construed to bestow such responsibility, jurisdiction or power upon the district attorney where there is no elected county prosecuting attorney, and any such matter shall be handled pursuant to subsection (8) of this section.

(5) In any case handled by the county prosecuting attorney pursuant to this section which subsequently results in charges

being modified in such a manner that the case would be within the jurisdiction of the district attorney pursuant to section 25-31-11, the responsibility for prosecution shall be transferred to the district attorney. The county prosecuting attorney shall report to the district attorney the disposition of all affidavits, crimes, occurrences or arrests handled by him wherein any person is charged with a crime for which a conviction may result in imprisonment in the state penitentiary.

(6) The validity of any judgment or sentence shall not be affected by the division of jurisdiction under this section, and no judgment or sentence may be reversed or modified upon the basis that the case was not processed according to subsection (5) of this section.

(7) A county prosecuting attorney may be designated by the district attorney to appear on behalf of the district attorney pursuant to an agreement relating to appearances in certain courts or proceedings in the county of the county prosecuting attorney. Such agreement shall be filed with the circuit court clerk of any county where such agreement shall be operative. Such agreement shall be binding upon the district attorney and county

prosecuting attorney or municipal prosecuting attorney until dissolved by either of them in writing upon five (5) days' notice.

(8) In the event that there is no elected county prosecuting attorney serving in a county, the prosecution of such cases shall be handled by a county attorney employed by the board of supervisors of such county pursuant to section 19-3-49.

Section 25-31-11: Duties of District Attorney

(1) It shall be the duty of the district attorney to represent the state in all matters coming before the grand juries of the counties within his district and to appear in the circuit courts and prosecute for the state in his district all criminal prosecutions and all civil cases in which the state or any county within his district may be interested; but if two (2) or more counties are adversely interested, the district attorney shall not represent either. Any district attorney may also institute and prosecute to final judgment or decree any case in the name of the state against any person or corporation for any violation of the constitution or the laws of

this state, in order to enforce any penalties, fines or forfeitures imposed by law in any court of his district having jurisdiction, with like effect as if the suit was instituted by the attorney general.

(2) The district attorney may transfer any case handled by him to a county prosecuting attorney when charges in such case no longer constitute a felony.

(3) The validity of any judgment or sentence shall not be affected by the division of jurisdiction under this section, and no judgment or sentence may be reversed or modified upon the basis that the case was not processed according to this section.

(4) A county prosecuting attorney or municipal prosecuting attorney may be designated by the district attorney to appear on behalf of the district attorney pursuant to an agreement relating to appearances in certain courts or proceedings in the county of the county prosecuting attorney or in the municipality of the municipal prosecuting attorney. Such agreement shall be filed with the circuit court clerk of any county where such agreement shall be operative. Such agreement shall be binding upon the district attorney and county prosecuting attorney or

municipal prosecuting attorney until dissolved by either of them in writing upon five (5) days' notice.

(5) Where any statute of this state confers a jurisdiction, responsibility, duty, privilege or power upon a county attorney or county prosecuting attorney, either solely, jointly or alternatively with a district attorney, such county prosecuting attorney shall be responsible for the prosecution, handling, appearance, disposition or other duty conferred by such statute. Any such provision shall not be construed to bestow such responsibility, jurisdiction or power upon the district attorney where there is no elected county prosecuting attorney, and any such matter shall be handled pursuant to section 19-3-49, Mississippi Code of 1972.

(6) The district attorney or his designated assistant, or the county prosecuting attorney or his designated assistant, shall assist the attorney general in appeals from his district to the Mississippi Supreme Court and in other post judgment proceedings, and shall appear for oral argument before the supreme court when directed by the supreme court.

(7) The several district attorneys shall submit reports of revenues and expenditures and

shall submit budget requests as required for state general fund agencies. For purposes of budget control, the several offices of district attorney shall be considered general fund agencies and the budget and accounts of the several offices, including salaries, travel expenses, office expenses and any other expenditures or revenues, shall be consolidated for all districts as far as such consolidation is practical.

All revenue or funds allocated or expended by a district attorney, whether such funds are appropriated from state funds, or whether such funds are received from county funds, grants or otherwise, shall be reported to the commission of budget and accounting.

NO. 82-1330

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

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MORRIS L. THIGPEN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF
CORRECTIONS, ET AL.,

Petitioners,

vs.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF OF AMICUS CURIAE SUPPORTING
ORAL ARGUMENT TO BE PRESENTED ON
INVITATION FROM THE COURT IN SUPPORT
OF THE JUDGMENT BELOW

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REPLY TO BRIEF OF AMICUS CURIAE
SUPPORTING ORAL ARGUMENT TO BE
PRESENTED ON INVITATION FROM THE
COURT IN SUPPORT OF THE
JUDGMENT BELOW

I. BLOCKBURGER:
FACTS VS. ELEMENTS

The preponderant theme of the position taken by amicus curiae is that the limiting of double jeopardy to a statutory analysis versus a factual analysis would unreasonably constrict the historic protection against double jeopardy. We note the recent discussion of the Mississippi Supreme Court in Smith v. State, 429 So.2d 252 (Miss. 1983):

Appellant contends that his trial and conviction under the burglary charge in the case sub judice exposed him to double jeopardy under the United States and Mississippi Constitutions.

We have thoroughly researched this question presented under the facts, evidence and indictments resulting in appellant's convictions

and are forced to the conclusion that the state was legally and constitutionally justified in indicting, trying and convicting appellant under both the rape charge and the burglary charge.

The bellwether case applicable to the question before us in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1931). In that case the charges grew out of an essentially same set of facts that resulted in multiple indictments and convictions regarding the sale of narcotics. The court, through Mr. Justice Sutherland, set out the primary principle involved in problems such as that now before us. There it was stated:

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statute provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Gavieres v. United States, 220 U.S. 338, 342, 55 L.Ed. 489, 490,

31 S.Ct. 421, and authorities cited. In that case this Court quoted from the adopted the language of the Supreme Court of Massachusetts in Money v. Com., 108 Mass. 433: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

(284 U.S. at 304, 52 S.Ct. 182, 76 L.Ed. 309).

Id., at 254.

In conclusion the Court held:

Applying the principles in the above discussed cases and examining the burglary and rape statutes under which appellant was convicted in separate trials, we find that the essential elements of the criminal charges in each statute are entirely different. As stated in Blockburger, supra, "each of the offenses created required proof of a different element." Although most of the testimony in both trials were essentially the same, this testimony was admissible under the res gestae rule. An examination of the rape conviction reveals that appellant here

did not testify; whereas, he testified in the present burglary trial. It is inescapable that when appellant, as found by the jury, broke and entered the dwelling, during the nighttime, armed with a deadly weapon, with the intent to commit a crime, he had concluded the statutory requirements under the burglary charge. We hold that a conviction under this charge was not constitutionally prohibited under the double jeopardy provisions of the Constitution.

Id., at 257.

See also: United States v. Mulherin, 710 F.2d 731 (11th Cir. 1983); United States v. Brown, 692 F.2d 345 (5th Cir. 1982); United States v. Pearson, 655 F.2d 569 (5th Cir. 1981); United States v. Bright, 630 F.2d 804 (5th Cir. 1980); United States v. Rodriguez, 612 F.2d 906 (5th Cir. 1980); United States v. Cowart, 595 F.2d 1023 (5th Cir. 1979); United States v. Dunbar, 591 F.2d 1190 (5th Cir. 1979); Beckley v. State, 357 So.2d 1022 (Ala. Cr. App. 1978); State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (N.C. 1980); People v. Flores, 92 Mich. App. 130, 284 N.W.2d 510 (Mich. App. 1979); Hughes

v. State, 401 So.2d 1100 (Miss. 1981).

Likewise, we find that in the matter sub
judice there is a lack of mutuality between the
elements of manslaughter by culpable negligence
and reckless driving under Miss. Code Anno.
§§ 97-3-47 and 63-3-1201 (1972). To hold as
advocated by amicus curiae, this Court would ne-
gate the State's ability to prosecute by sepa-
rate indictment for all offenses arising out of
the same act or transaction or from a common
scheme or plan. Within this context, we note
the ruling of the Mississippi Supreme Court in
Stinson v. State, 443 So.2d 869, 873 (Miss.
1983), holding that "it was error for the state
to charge . . . [a defendant] in three separate
counts for separate and distinct offenses"
The impact of the ruling herein became exceeding-
ly clear in the recent case of Davis v. Herring,
N.D. Miss. No. EC83-175-WK-O (Report and Recom-
mendation of Magistrate Orlansky, dated May 19,

1983, adopted as the opinion of the Court on June 6, 1983), appeal docketed, No. 83-4421 (5th Cir, July 1, 1983), wherein the Court relying upon the decision herein held that the subsequent prosecution of the petitioner for shooting into an occupied dwelling under Miss. Code Anno. § 97-37-29 (1972) after a conviction of manslaughter under Miss. Code Anno. § 97-3-47 (1972) was a violation of the Double Jeopardy Clause even though there were four (4) other people in the building.

Petitioner submits that the ruling by the Fifth Circuit in the instant matter is a radical departure from past precedent. While admittedly the same evidence was introduced in support of both the reckless driving charge and the manslaughter charge, such is not comensorate with the "same evidence" test in Blockburger v. United States, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct.

180 (1932). We find the comments of the Fifth Circuit in United States v. Cowart, supra, at 1023-24, to be instructive:

To determine whether defendant was subject to multiple punishment for the same offense, we look to the leading case of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 86 L.Ed. 306 (1932), where the Supreme Court of the United States formulated the applicable standard.

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304, 52 S.Ct. at 182. See also Brown v. Ohio, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); Jeffers v. United States, 432 U.S. 137, 151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977).

This standard frequently has been referred to as the "same evidence" test; however, the Blockburger test

looks not to the evidence adduced at trial but focuses on the elements of the offense charged. Brown v. Ohio 432 U.S. at 166, 97 S.Ct. at 2225 (Blockburger test emphasizes the elements of the two crimes): Iannelli v. United States, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975) ("If each [offense] requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."); United States v. Dunbar, 591 F.2d 1190, 1193 (5th Cir. 1979) ("Application of the [Blockburger] test focuses on the statutory elements of the offenses charges."). An examination of the elements of the respective offenses of "conspiracy" and "aiding and abetting" demonstrates that Cowart was convicted of two, separate and distinguishable offenses.

As we stated previously, an examination of the statutory offenses here involved reveals that each contains elements not common to the other. The offense of reckless driving is predicated upon the manner of the operation of a motor vehicle and is in no way dependant upon any resultant injury to persons or property. See: Barnes v. State, 249 Miss. 482, 162 So.2d 865 (1964);

Gause v. State, 203 Miss. 377, 34 So.2d 729 (1948); Sanford v. State, 195 Miss. 896, 16 So. 2d 628 (1944). The crime of manslaughter by culpable negligence, by contrast, not only involves an unlawful homicide but is not restricted as to either instrumentality or location. Gandy v. State, 373 So.2d 1042 (Miss. 1979). See also: Cutshall v. State, 191 Miss. 764, 4 So.2d 289 (1941). Consequently, we are not confronted with the situation found in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980), where the defendant was charged with manslaughter under a specific statute governing homicide while operating a motor vehicle. See 9-3 of the Illinois Criminal Code, Ill. Rev. Stat., Ch. 38, § 9-3 (1973). The crime of reckless driving under Miss. Code Anno. § 63-3-1201 (1972) is separate and distinct crime from that of manslaughter by culpable negligence under Miss. Code Anno. § 97-3-47 (1972), and it was,

therefore, error for the lower Federal courts to hold that the conviction of manslaughter herein constituted a violation of the Double Jeopardy Clause.

II. THE ISSUE OF THE
TRIAL DE NOVO

Amicus Curiae asserts in his brief in support of oral argument that the petitioner has in violation of the rules of this Court attempted to insert a new issue which was not raised in the Petition for Writ of Certiorari.

The discussion of the law concerning trials de novo may not be divorced from the Court's consideration of the issues herein. Sup. Ct. Rule 34.1(a); Procunier v. Navarette, 484 U.S. 555, 55 L.Ed.2d 24, 98 S.Ct. 853 (1978); Lake Country Estates v. Tahoe Planning Agcy., 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979). The fact that the double jeopardy issue arose in the procedural setting of an appeal from the Justice

Court to the Circuit Court was clearly set forth in the Statement of the Case. Garner v. United States, 424 U.S. 648, 47 L.Ed.2d 370, 96 S.Ct. 1178 (1976).

Within this context, we note that the inclusion of the discussion of Colten v. Kentucky, 407 U.S. 104, 32 L.Ed.2d 584, 92 S.Ct. 1953 (1972), was not so much the injection of a new issue but the discussion of the procedure by which the two charges in question proceeded through the State courts.

We note in particular the sharply defined distinction between Vitale and the matter sub judice when considered in light of Colten. Unlike Vitale who pled guilty to a charge of failing to reduce speed and later sought no further relief on the issue, the respondent herein entered a plea of guilty to a number of motor vehicle offenses in Justice Court and on the same day

perfected his appeal to the Circuit Court.

Consequently, petitioner submits that the discussion of Colten was fairly comprised within the petition for Writ of Certiorari and should be considered by the Court as a subsidiary issue herein. Alternatively, we note that respondent did not raise this issue in his reply and must be contrued to have waived his objection. Cas-taneda v. Partida, 430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977).

III. CONCLUSION

For these reasons and those previously discussed, petitioner respectfully urges the Court to reverse the decision of both the Court of Appeals and the District Court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

STANLEY L. DAVIS, Petitioner

NO. EC 83-175-WK-O

ROBERT HERRING, et al RESPONDENTS

REPORT AND RECOMMENDATIONS

Petitioner Stanley L. Davis is a prisoner of the State of Mississippi presently in the physical custody of respondent Robert Herring, Sheriff of Lee County, awaiting trial on an indictment charging him with shooting into an occupied building in violation of §97-37-29, Mississippi Code (1972). In his pro se petition Davis contends that his continued prosecution on the §97-37-29 charge causes him to be placed twice in jeopardy in violation of the Fifth and Fourteenth Amendments to the federal constitution because on an earlier date he was convicted of manslaughter in the Circuit Court of Lee County and sentenced to serve a term of eighteen years

in the Mississippi Department of Corrections by reason of the identical incident out of which the §97-37-29 charge arises and on proof which was identical with that which the state will offer against him if he is tried on that charge.^{1/}

Because the Court of Appeals for the Fifth Circuit has recognized that

"[d]ouble jeopardy is not a mere defense to a criminal charge; it is right to be free from a second *prosecution*, not merely a second *punishment* for the same offense (through that is obviously included in the right). The prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'" (Citations omitted.) Fain v. Duff, 488 F. 2d 218, 224 (5 Cir. 1973);

^{1/} Petitioner also sought damage and injunctive relief under 42 U.S.C. §1983, but by order dated May 11, 1983 the magistrate directed that the habeas and §1983 claims be served and proceed with separately, pursuant to Rule 42(b), Federal Rules of Civil Procedure; that Davis' §1983 claims be docketed as a separate action an amended complaint stating separately his claims under §1983. Under the terms of that order only Davis' habeas claims remain pending in this action.

and because the petition indicated that petitioner's trial on the §97-37-29 charge was scheduled to begin on May 31, 1983 it became obvious that this is one of the rare habeas petitions by a state prisoner to the petitioner's state court trial and possible conviction.

Further, because of the imminence of petitioner's scheduled trial date, it was recognized that petitioner's right not to be placed twice in jeopardy might, even if his contention should be well taken, be defeated should his state court trial take place before this court could dispose of the merits of his constitutional claim. Accordingly, counsel was appointed to represent petitioner, and a hearing was scheduled for May 18, 1983 at Greenville on the issue of whether or not the state court proceedings should be stayed pending this court's resolution of the double jeopardy issue on the merits. See, Robinson v. Wade, 688 F.2d 298, 302, n. 7 (5 Cir. 1982).

However, at the outset of the stay hearing it was announced by counsel for both petitioner and respondents that they were prepared to proceed on the merits of the double jeopardy issue. A stay hearing being, for all practical purposes, the functional equivalent of a preliminary injunction hearing, Robinson v. Wade, supra, it was appropriate, in view of the readiness of the parties to proceed on the merits, to advance trial of the action on the merits and consolidate it with the stay hearing under the provisions of Rule 65(a) (2), Federal Rules of Civil Procedure. The hearing then proceeded on the merits of petitioner's double jeopardy claim.

It is recommended that the court adopt the following as the findings of a fact and conclusions of law required by Rule 52(a), Federal Rules of Civil Procedure.

Since the custody which petitioner attacks is pretrial, and thus is not "... pursuant to the judgment of a State court" within the

meaning of 28 U.S.C. §2254(a), his petition does not sound under §2254, but under 28 U.S.C. §2241(c) (3), which provides for habeas corpus relief for all persons held "... in custody in violation of the Constitution or laws or treaties of the United States." Thus, the express statutory exhaustion of state remedies requirement of 28 U.S.C. §2254(b) & (c) is inapplicable here. This is a distinction without a difference, however, since, under principles of comity, exhaustion of state remedies has long been held a prerequisite to relief under §2241(c) (3). Ex parte Royall, 117, U.S. 240 (1886); Robinson v. Wade, supra, at 303, n. 8.

Exhaustion is an issue which need not detain the court long because it is clear, as counsel for respondent conceded at the hearing, that petitioner has presented the substance of his constitutional claims to the state courts of Mississippi in such fashion as to afford the state courts a fair opportunity to rule on the merits of those claims and has been denied relief. This is all that the

exhaustion doctrine requires. Picard v. Connor, 404 U.S. 270, 275 (1971). This was accomplished by a motion in the trial court to quash the indictment on double jeopardy grounds. That motion was denied. Subsequently petitioner sought a writ of prohibition from the Supreme Court of Mississippi, which was denied without prejudice to petitioner's raising the double jeopardy defense in the trial court and urging it on any appeal, if convicted (Exhibit P-6). Petitioner has thus afforded the state courts an opportunity to consider the merits of his constitutional claims prior to his being placed on trial, and has been denied relief. Accordingly, as respondents concede, he has exhausted his available state remedies, and it is appropriate for the court to consider the merits of his double jeopardy claim.

The relevant facts are simple, straightforward and not in dispute. On October 28, 1981 petitioner fired a series of shots, estimated by the witnesses to be either five

or six in number, from a vehicle into a building leased and operated by one Wayne Watson as a lounge under the trade name of Seay's Lounge in Lee County. At the time the shots were fired the lounge was occupied by Watson, his wife, and three other persons. At least five of the bullets fired by petitioner entered the building, and one of them struck and killed Watson. At least one other shot struck the exterior of the building, but did not penetrate the wall. None of the other four persons inside the lounge were shot or injured as a result of the shooting, although all of them fell to the floor for protection, and Mrs. Watson suffered understandable shock and emotional trauma. All of the shots were fired in rapid succession during a very brief period of time.

In November, 1981 petitioner was indicated for murder in the death of Watson. He was duly tried on that indictment in the Circuit Court of Lee County, and on September 2, 1982 a jury returned a verdict finding him guilty of man-

slaughter. He was sentenced to a term of 18 years in the Mississippi Department of Corrections. On February 1, 1982 Petitioner was also indicated for the offense of shooting into an occupied building in violation of § 97-37-29, Mississippi Code (1972). That indictment was based upon the same shooting spree which led to petitioner's manslaughter conviction. The charge is presently pending in the Circuit Court of Lee County and is set for trial on June 14, 1983. John R. Young, District Attorney for the First Circuit Court District, of which Lee County is a part, and Joe Blair Timmons, County Prosecuting Attorney, testified without contradiction that the same evidence as was offered against petitioner in his murder trial will be used against him in the trial for shooting into a building.

Although petitioner fired several times, and through at least five bullets penetrated into the interior of the lounge, only one of them struck Watson. Nevertheless, respondents

do not take the position that petitioner's firing of multiple shots into the building constituted a series of separate criminal acts. Instead, they conceded at the hearing that the shots fired by petitioner, coming as they did in such rapid succession and within such a brief period of time, were the result of a single impulse and thus constituted but a single criminal act. See, Blockburger v. United States, 284 U.S. 299, 302 (1932). Accordingly, the court is not presented with the issue of whether or not petitioner may be separately prosecuted for each shot which he fired.

The double jeopardy clause affords protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Albernaz v. United States, 450 U.S. 333, 343 (1981); Whalen v. United States, 445 U.S. 684, 688 (1980); Brown v. Ohio, 432 U.S.

161, 165 (1977); North Carolina v. Pearce,
395 U.S. 711, 717 (1969).

The classic formulation of the double jeopardy test is drawn from the court's opinion in Blockburger v. United States, supra.

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.... 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'" 284 U.S. at 304.

Thus, the test is not whether one or the other of the two statutes in question requires proof of some additional fact which the other does not, but whether each statute requires proof of some fact which the other does not.

In Whalen v. United States, supra, the Supreme Court characterized the Blockburger rule as one of statutory construction and stated:

"The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." 445 U.S., at 691-692.

This, the intent of the legislative body, in this case the Mississippi Legislature, which enacted the statutes in question must be taken into account if it can be ascertained. However, in the absence of a clear indication of legislative intent to authorize cumulative punishments, there is a presumption that cumulative punishment was not the intent of the legislature. On the other hand, if there is a clear indication of legislative intent to impose cumulative punishment, the Blockburger test is inapplicable, since it merely serves as a means of discerning legislative intent. Missouri v. Hunter, ___, ___; 74 L.Ed. 2d 535, 543 (1983); Albernaz v. United States, supra, at 340. If the legislative body intended to

impose multiple punishments, such punishments do not violate the double jeopardy clause.

Missouri v. Hunter, supra, at 543; Albernaz v. United States, supra, at 344.

Thus, the proper sequence of analysis is to first ask, what did the legislature intend? Is it clear from the statutes in question whether the legislature intended two punishments or only one, or is it unclear? If the legislative intent is not clear, then it is necessary to proceed to the next step, which is the Blockburger test--whether or not the two statutes each require proof of some unique fact which the other does not.

The statute under which petitioner is presently indicated, §97-37-29, Mississippi Code (1972), reads as

"If any person shall wilfully and unlawfully shoot or discharge any pistol, shotgun, rifle or firearm of any nature or description into any dwelling house or any other building usually occupied by persons, whether actually occupied or not, he shall be guilty of a felony whether or not anybody be injured thereby, and, on conviction thereof, shall be punished by imprisonment in the state penitentiary for a term not to exceed

ten (10) years, or by imprisonment in the county jail for not more than one (1) year, or by fine of not more than five thousand dollars (\$5,000.00), or by both such imprisonment and fine, within the discretion of the court."

The crime of murder is defined by §97-3-19, Mississippi Code (1972) as:

"The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

"(a) When done with deliberate design to effect the death of the person killed or of any human being;

"(b) When done in the commission of an act imminently dangerous to others and evidencing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

"(c) When done without any design to effect death by any person engaged in the commission of rape, burglary, arson, or robbery, or in any attempt to commit such felonies."

Under the provisions of § 97-3-47, Mississippi Code (1972);

"Every other killing of a human being by the act, procurement or culpable negligence of another and without authority of law not provided for in this Title, shall be manslaughter."

The court has been provided with no

legislative history of these statutes, and there is nothing in the language of any of them to indicate whether or not, in adopting §97-37-29, the state legislature intended to enhance the punishment for murder or manslaughter if committed as a result of firing into an occupied building. There is certainly no evidence of a clear legislative intent to do so.

It appears likely that § 97-37-25 was enacted to fill a perceived gap in Mississippi's scheme of criminal law in order to discourage shootings into dwellings and other buildings normally occupied by human beings by enacting a specific criminal statute providing a severe penalty for such acts, whether or not the building is actually occupied at the time of the shooting, and whether or not any person is actually injured. However, there is no clear manifestation of a legislative intent to provide cumulative punishments in these circumstances. Thus, the Blockburger test must be applied.

The Supreme Court of Mississippi has never authoritatively construed §97-37-29, and there is therefore no interpretative gloss to aid the court's analysis of that statute. On the other hand, there have been many Mississippi decisions construing the murder (§97-3-19) and manslaughter (§97-3-47) statutes. It is unnecessary to engage in a detailed comparison of the statutes, however, because it is obvious from their language that not every shooting into a dwelling or building normally occupied by humans will constitute murder or manslaughter, and that not every murder or manslaughter, as defined in the Mississippi statutes, will come about as the result of a shooting into an occupied building. It is thus clear that shooting into an occupied building may be, but is not necessarily, a lesser included offense of murder or manslaughter. It is settled double jeopardy law that conviction of the greater offense bars a subsequent prosecution for a lesser included

offense. Harris v. Oklahoma, 433 U.S. 692 (1977); Brown v. Ohio, supra, at 168.

In Illinois v. Vitale, 447 U.S. 410 (1980), the Supreme Court, recognizing that ".... the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial....," 447 U.S., at 416, also recognized the existence of a modified test to be applied in cases where the lesser crime may be, but is not always, a constituent or lesser included offense of the greater crime.

Vitale involved an attempted prosecution for manslaughter after conviction of the defendant for failing to reduce speed to avoid an accident. The defendant had struck two small children while driving an automobile, and both of the children were killed. It was not clear to the court in Vitale that under Illinois law every offense of manslaughter by motor vehicle necessarily also involved a failure to reduce speed to avoid an accident. Of course, it was obvious that not every

every failure to reduce speed to avoid an accident constituted vehicular manslaughter.

For that type of case the court recognized the existence of an "evidence" test.

"in any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*, 433 U.S. 692 (1977).

" In *Harris*, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purpose of the Double Jeopardy Clauses, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a

killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Nelson*, 131 U.S. 176 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense-an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown*, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

"By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid the accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." 447 U.S., at 420-421.

Because of its uncertainty as to the state of Illinois law, and because the acts which the state would rely on to prove manslaughter were unknown, the Supreme Court remanded Vitale to

the Illinois courts for further proceedings.

The "evidence" test of Vitale was applied by the Court of Appeals for the Fifth Circuit in its unpublished opinion in Roberts v.

Thigpen, No. 82-4067, decided November 16, 1982 affirming this court's grant of habeas corpus relief to a petitioner claiming violation of the double jeopardy clause arising out of his conviction of manslaughter after having previously been tried and convicted of reckless driving as a result of the same motor vehicle accident. In Roberts, the court said:

"The focus here is on the evidence actually presented at trial. If the state had to prove reckless driving or had to rely on conduct necessarily involving reckless driving in order to prove manslaughter Roberts had a substantial claim of double jeopardy under the fifth and fourteenth amendments of the United States Constitution. The same evidence that led to Roberts's conviction on the misdemeanor charge was also introduced in the manslaughter trial. The trial court's instructions to the jury leave no room for doubt that Mississippi did indeed rely on and prove reckless driving as the culpable act of negligence necessary to prove manslaughter." Slip op. pp. 7-9.

A copy of the court's opinion in Roberts is appended hereto.

In this case there is not, as there was in Vitale, any uncertainty or doubt that the state intends to offer against petitioner at his trial for shooting into an occupied building the very same evidence which it offered against him at his murder trial. In attempting to prove petitioner guilty of murder, and in proving him guilty of manslaughter, the state proved that he intentionally and without lawful cause shot a pistol into Seay's Lounge, a place of public accommodation, and thus a building usually occupied by persons. It is precisely that same evidence which will be offered to attempt to prove him guilty of shooting into an occupied building. The fact that it was also necessary, in order to convict petitioner of manslaughter, to prove that Watson was killed as a result of the shooting does not satisfy the Blockburger test, since proof of a unique fact must be necessary in order to establish each offense. The court

must therefore conclude that petitioner's prosecution for the offense of shooting into an occupied building places him twice in jeopardy for the same offense in violation of rights guaranteed him by the double jeopardy clause of the Fifth Amendment, made applicable to the states through the Fourteenth. See, Brown v. Ohio, supra, at 164.

In opposing the petition respondent has relied heavily on the recent decision of the Supreme Court in Missouri v. Hunter, supra. However, that decision is readily distinguishable on two grounds. First, the Missouri legislature expressly provided in the armed criminal action statute there under consideration that punishment under that statute was to be in addition to the punishment provided by law for the underlying crime. 74 L.Ed 2d, at 539-540. There is, of course, no such clear expression of legislative intent in this case. Second, although probably not of controlling significance, see, Brown v. Ohio, supra,

at 166, the precise issue decided by the Supreme Court in Hunter was "... whether the prosecution and conviction of a criminal defendant in a single trial on both a charge of 'armed criminal action' and a charge of first degree robbery--the underlying felony--violates the Double Jeopardy Clause of the Fifth Amendment." 74 L.Ed.2d, at 538. This case, of course, does not involve imposition of cumulative punishments in a single trial. Missouri v. Hunter is therefore not controlling here.

It is therefore recommended that the petition be granted and that the writ issue directing that petitioner be discharged from the custody of the respondents in connection with his presently pending prosecution in the Circuit Court of Lee County for the offense of shooting into an occupied building in violation of §97-37-29, Mississippi Code (1972).^{2/}

^{2/} This, of course, will have no effect on petitioner's manslaughter conviction, nor

the sentence which he is presently serving as a result of that conviction. It means simply that the state is prohibited by the double jeopardy clause from again trying petitioner for the same offense.

The parties are referred to Local Rule M-3(a) for the applicable procedure in the event any party desires to file objections to the findings and recommendations herein contained. The parties are warned that any such objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its filing will bar an aggrieved party from attacking such findings and recommendations on appeal. Nettles v. Wainwright, 677 F. 2d 404 (5 Cir. 1982).

Respectfully submitted, this the 19th day of May, 1983.

s/ J. David Orlansky
United States Magistrate

APPENDIX

(The appendix to the Magistrate's Report and Recommendation has been omitted).

AUG 11 1983

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MORRIS THIGPEN, ET AL.,

Petitioners,

vs.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF
NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, INC., and the
MISSISSIPPI PROSECUTORS ASSOCIATION,
AS AMICI CURIAE
IN SUPPORT OF THE PETITIONERS**

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QUESTION PRESENTED

Whether the Court of Appeals applied the correct standard of review in holding that Respondent has a substantial double jeopardy claim under the holding in *Illinois v. Vitale*, 447 U. S. 410, 65 L. Ed 2d 228, 100 S. Ct. 2260 (1980).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MORRIS THIGPEN, ET AL.,

Petitioners,

VS.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF
NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, INC., and the
MISSISSIPPI PROSECUTORS ASSOCIATION,
AS AMICI CURIAE
IN SUPPORT OF THE PETITIONERS**

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by William S. Boyd, III, Special Assistant Attorney General, State of Mississippi, attorney for the Petitioners, and Cleve McDowell, Esq., attorney for the Respondent. Letters of Consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

The NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., is a non-profit corporation and the sole national

organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and *amicus curiae* activity carry out its guiding purpose since its founding in 1950 of reforming the criminal justice system for the benefit of all our citizens.

The MISSISSIPPI PROSECUTORS ASSOCIATION is the professional organization representing prosecuting attorneys in the State of Mississippi. By programs of training, publications, legislative and judicial advocacy, it seeks to raise the level of prosecutorial services for the people of that State.

The prosecutors of the various states are vested with the responsibility of representing all the citizens of their respective jurisdictions by charging and prosecuting those who are alleged to have violated the criminal laws. The prosecutor is therefore responsive to the citizenry of his jurisdiction, and the need to promote the safety of all individuals within the context of sound criminal justice principles and the framework of state and federal constitutions.

In this respect, the prosecutor must have the resources and authority to proceed in the charging and prosecution of both homicide offenses and traffic violations. There are no other offenses with a greater threat to life and limb. Our society can only achieve a reasonable level of voluntary compliance with the traffic and criminal laws when the prosecutor diligently exercises his authority to bring violators to justice. Upholding the opinion of the Fifth Circuit in this case threatens our fundamental freedoms just as certainly as do those drunk drivers who daily cause the carnage on our highways to an extent unparalleled in our history.

STATEMENT

Respondent was indicted, tried and convicted of manslaughter by means of culpable negligence in the Circuit Court of Tallahatchie County, Mississippi. He was sentenced to serve twenty (20) years imprisonment.

Respondent's trial and conviction on the manslaughter charge resulted from a tragic collision on August 6, 1977, between an automobile driven by Respondent and a pickup truck, in which collision a ten-year-old child was killed. Shortly after the accident, Respondent was cited by a Mississippi Highway Patrolman for driving under the influence, driving on the wrong side of the road, driving with a suspended license, and reckless driving. On August 13, 1977, Respondent was tried and convicted on these charges by a Tallahatchie County Justice Court Judge; on the same date, Respondent appealed the convictions to the Circuit Court of Tallahatchie County pursuant to Miss. Code Ann. § 99-35-1. Before the misdemeanor charges were retried on appeal, Respondent was indicted by the Tallahatchie County Grand Jury for manslaughter of the child killed in the traffic collision. Trial of the Respondent on the misdemeanors thereafter was consolidated with trial of the manslaughter charge, but the misdemeanor appeals were nolle prossed during the consolidated trial.

On or about March 13, 1981, Respondent filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District of Mississippi, which was granted on January 18, 1982, and affirmed by the Court of Appeals for the Fifth Circuit.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit improperly applied a judicial construction to a state statute of homicide and then found this statute to be sufficiently similar to a reckless driving offense to implicate double jeopardy principles. The court misinterpreted the Mississippi case law and should not have applied it to modify the elements of the statute and thereby usurp the legislative function. Further, it was against public policy for the court to construe legislation in a manner that failed to deter abuses of the driving privilege by drunk drivers who cause the death of our citizens by their irresponsible, negligent and criminal behavior.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS ERRED IN THAT IT APPLIED A STATE JUDICIAL CONSTRUCTION OF A STATE STATUTE IMPROPERLY, AND TOOK THAT CONSTRUCTION TO BE A STATUTORY ELEMENT, RATHER THAN DISCERNING THAT THE JUDICIAL CONSTRUCTION WAS MERELY THE APPLICATION OF PARTICULAR FACTS TO A HOMICIDE STATUTE. THE COURT THEREBY ATTEMPTED TO CREATE THE OFFENSE OF "MANSLAUGHTER BY AUTOMOBILE", WHICH IS A USURPATION OF THE LEGISLATIVE FUNCTION. WITHOUT SUCH IMPROPER USURPATION, NO DOUBLE JEOPARDY CLAIM WOULD EXIST IN THIS CASE.

The United States District Court for the Northern District of Mississippi, and the United States Court of Appeals for the Fifth Circuit, in their opinions in the instant case, make repeated reference to the Mississippi offenses of "manslaughter by automobile," "vehicular homicide," and "manslaughter with a motor vehicle." The State of Mississippi quite simply has no such statutory offenses.

The homicide offense with which the Respondent was charged is Miss. Code Ann. § 97-3-47. This offense is captioned: "Homicide—all other killings." The statute provides that "[e]very other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law provided for in this title, shall be manslaughter." The caption and language of this offense clearly offer every indicia that the legislature has chosen not to adopt an offense of homicide with a motor vehicle.

The lower courts cite *Smith v. State*, 20 So. 2d 701 (Miss. 1945), as the authority for establishing the offense of "manslaughter by automobile" when that court stated, "the gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence which must be wanton or reckless under circumstances implying danger to human life." *Id.* at 704. A review of the *Smith* case rebuts the lower courts' interpretation on at least two accounts. First, the case in no manner holds or stands for the proposition that there is a statute of manslaughter by automobile in the State of Mississippi. The quote in question is nothing but dictum used to amplify the issue that culpable negligence is not equivalent to gross negligence. The quoted phrase could have made the same point by stating, "The gist of the offense of manslaughter, where factually a motor vehicle was the instrumentality causing the death, is criminal negligence . . ." *Amici* question whether the Fifth Circuit could have reached the same conclusion had the language varied to this slight degree.

The findings of the lower courts are even more questionable in light of other language in *Smith* which clarifies the distinction between mere traffic violations and manslaughter in terms of conduct, and thus goes to the central issue of the instant case. The court in *Smith* stated at 704:

In the *Cutshall* case, the court also said that "driving of a vehicle by one who is under the influence of intoxicating liquor is a misdemeanor. § 49. ch. 200, Laws 1938. The driving of an automobile while in this condition is therefore per se negligence. *Williams v. State*, 161 Miss. 406, 137 So. 106. But this does not mean that such evidence constitutes a prima facie case of manslaughter . . . Although a jury may find the conduct of the operator constitutes gross negligence, the violation of the statute is not culpable negligence per se within the definition of Section 1002 (which is the same as Section 2232, Code of 1942, here involved)." The same may be said in regard to the act of the defendant when he "carelessly and negligently . . . drove his car from the west side . . . to the east side of the road."

It is submitted that when read in its entirety, the *Smith* decision does not establish an offense of manslaughter by motor vehicle, but it does draw distinctions between the culpable negligence required to be shown in a manslaughter prosecution, and the negligence necessary for a simple traffic case. This case rebuts, rather than advances, the notion that manslaughter wherein an automobile was the instrumentality of death cannot be proven without at the same time proving reckless driving.

Assuming, *arguendo*, that Mississippi case law had adopted the term "manslaughter by motor vehicle," the federal courts then placed themselves in what the Fifth Circuit called a "novel situation." The novelty is that these courts treat the judicial interpretation of the homicide offense as, in effect, quasi-legislative alterations of the language of the statute.

The Fifth Circuit strongly indicates that if its considerations were undertaken on the basis of the manslaughter statute without the case law veneer, its conclusion would have been different. At footnote 6, the court states:

In prior cases the two offenses in question have been specifically defined by distinct statutes. For example in *Illinois v. Vitale*, both the traffic offense of failure to reduce speed and the felony offense of involuntary manslaughter by motor vehicle were statutory . . . In *Brown v. Ohio*, two specific statutes were involved, joyriding and auto theft.

The court then makes the circular argument that this need not be considered because under the second prong of the analysis in *Illinois v. Vitale*, 447 U. S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260 (1980), the prosecution had to establish reckless driving in proving manslaughter. But such can only be true if the manslaughter statute is construed to include the court's interpretation of the Mississippi case law. We submit that the court made an improper determination of the case law. However, a far more fundamental issue is that the Fifth Circuit interprets the statute as if it has been amended by the state courts, which would be an unquestionable judicial usurpation of the legislative function.

For the purpose of determining double jeopardy, the courts must look at the *statutory* elements of the charges. *See, Illinois v. Zegart, cert. den.*, 452 U. S. 948, 951 (1981) (Rehnquist J., dissenting). To add to or subtract from those elements based upon judicial interpretation violates the fundamental roles of the respective branches of government.

The Mississippi Constitution, at Article 1, Section 1, provides:

The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

That constitutional provision has been interpreted by the Mississippi courts to mean that the courts cannot substantially change a statute. *Yerger v. State*, 91 M. 802, 45 So. 849; *Hamner v. Yazoo Delta Lumber Co.*, 100 M. 349, 56 So. 466; *State v. Traylor*, 100 M. 544, 56 So. 521.

Further, Article 4, Section 33 of the Mississippi Constitution provides, "The legislative power of this state shall be vested in a legislature which shall consist of a senate and a house of representatives."

While many state legislatures have enacted laws which relate specifically to homicides resulting from the operation of motor vehicles, Mississippi's legislature has not done so. We do not believe that the Mississippi courts have accomplished what would undoubtedly be an encroachment and usurpation of the legislative authority in violation of the state's Constitution, and it was manifestly improper for the federal courts in this case to reach such conclusion.

II.

IT IS AGAINST PUBLIC POLICY TO CONSTRUE STATE STATUTES IN A MANNER RESULTING IN A FINDING OF DOUBLE JEOPARDY WHERE THE RESPONDENT WAS FOUND TO HAVE BEEN DRIVING UNDER THE INFLUENCE OF ALCOHOL, DRIVING ON THE WRONG SIDE OF THE ROAD, DRIVING WITH A SUSPENDED LICENSE AND RECKLESS DRIVING, RESULTING IN THE DEATH OF A 10 YEAR OLD CHILD.

The traffic laws of each state are like all other laws in that they are designed to provide for the welfare of the populace. However, they are also distinct from other laws because they govern the use of an instrumentality which provides great benefit when operated properly, and fatal detriment when operated improperly. Traffic laws have been successful by providing order to a technology which has permitted the greatest measure of mobility in the history of mankind. At the same time, traffic laws, both in their enactment and administration, have been hindered in their efforts to safeguard society from those who abuse the driving privilege.

All those involved in traffic law administration and enforcement must share this responsibility—the state legislatures as they enact traffic laws, the courts as they apply those laws, and the executive branch as it administers the driving privilege. Each branch of government must be responsive to the public's concerns.

Our traffic laws are like all other laws in that they depend to some extent upon the deterrent effect of sanctions to secure compliance. Each driver must know that the consequences of violating these laws will exceed the benefits derived from such actions. It is not a question of knowing right and wrong, but rather weighing the benefits against the consequences when a driver decides to exceed the speed limit, fails to yield the right-

of-way, or violates other traffic laws. If those involved in traffic law enforcement, prosecution and sentencing can impress upon drivers that the risks are substantial, more drivers will make the rational decision of abiding by traffic laws and regulations.

It is a fundamental concept of deterrence that when sanctions are severe, the risk need not be as certain to achieve a higher degree of voluntary compliance. While the vastness of our roadways combines with the limitations of our enforcement resources to preclude the certainty of sanctions issuing against all traffic violators, the severity of punishment is an alternative to which we must resort for life-threatening circumstances such as that found in cases of drunk driving.

Recent years have shown a growing public concern for the need to deal with the drunken driver in the harshest manner possible. The emergence of grass roots organizations marshaling public awareness of this problem of the drunken driver is not only indicative of this concern, but also a reflection of the need for police, prosecutors and judges to respond to efforts to remove these drivers from our roads.

Amici note that the U. S. Supreme Court has been a leading force in promoting highway safety generally and in deterring drunken drivers specifically. We will not repeat here the statistical data which sadly catalogues the appalling loss of life, crippling effect and economic loss involved in this problem. The Court itself has reviewed this information in recent decisions on this topic. We ask only that the Court be mindful of statements from recent cases such as *South Dakota v. Neville*, ____ U. S. ____, 74 L. Ed 2d 748, 103 S. Ct. 916, 920 (1983):

The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the

problem that the state courts have has repeatedly lamented the tragedy. See *Breithaupt v. Abrams*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d 130 (1970) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657 and 672, 91 S.Ct. 1704, 1715 and 1722, 29 L.Ed.2d 233 (1971) (Blackman, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-18, 99 S.Ct. 2612, 2620, 2621, 61 L.Ed.2d 321 (1979) (recognizing the "compelling interest in highway safety").

See also, *Illinois v. Batchelder*, ____ U. S. ____, ____ L. Ed 2d ____, 103 S. Ct. ____, 33 Cr L 4106 (1983).

To uphold the decision of the Fifth Circuit Court of Appeals in the instant case, where the driver had a suspended license, was under the influence of alcohol, crossed the center line, struck another car and caused the death of a 10 year old child, would be a brutal affront to all those who have suffered from such irresponsible behavior as well as those citizens who daily fear that they may be an innocent victim of this intolerable abuse of the driving privilege.

CONCLUSION

Amici submit that the finding of double jeopardy in this case is based on misconstrued and improperly applied case law to the statutory elements of the specific offense and such is a usurpation of legislative authority which when applied to the facts of this case is also an affront to public policy to rid our roads of drunk drivers. We respectfully request that the decision of the United States Court of Appeals for the Fifth Circuit be reversed on the facts, the law, and sound judicial policy.

Respectfully submitted,

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No. 82-1330

Title: Morris Thigpen, etc., et al., Petitioners
v.
Barry Joe Roberts, Respondent

Docketed:
February 9, 1983

Court: U.S. Court of Appeals
for the Fifth Circuit

Date

Proceedings and Orders

Feb 9 1983	Petition for writ of certiorari filed.
Mar 16 1983	DISTRIBUTED. April 1, 1983
Mar 29 1983	Response requested.
May 2 1983	Brief of respondent in opposition filed.
May 2 1983	Motion of respondent for leave to proceed in forma pauperis filed.
May 4 1983	DISTRIBUTED. May 19, 1983
May 23 1983	REDISTRIBUTED. May 26, 1983
May 31 1983	Motion of respondent for leave to proceed in forma pauperis GRANTED.
May 31 1983	Petition GRANTED.

Jun 9 1983	DEFERRED APPENDIX RULE
Jun 23 1983	Order extending time to file brief of petitioner on the merits until August 15, 1983.
Aug 4 1983	Order further extending time to file brief of petitioner on the merits until September 6, 1983.
Aug 11 1983	Brief amici curiae of National District Attorneys Association, Inc., et al. filed.
Sep 8 1983	Joint Appendix filed.
Sep 8 1983	Brief of petitioner Morris Thigpen, Commr., MS, DOC filed.
Sep 27 1983	Order extending time to file brief of respondent on the merits until November 5, 1983.
Nov 5 1983	Brief of respondent Barry Joe Roberts filed.
Dec 1 1983	CIRCULATED.
Dec 5 1983	It appearing that respondent is not represented by a member of the Bar of this Court, it is ordered that Rhessa H. Barksdale, Esquire, of Jackson, Mississippi, is invited to present oral argument as amicus curiae in support of the Judgment below. Oral argument in this case, presently scheduled for January 18, 1984, is postponed and the case of New York v. Uplinger, No. 82-1724, is set for oral argument in its stead.
Mar 17 1984	Brief amicus curiae of Rhessa H. Barksdale in support of judgment below filed.
Mar 20 1984	SET FOR ARGUMENT. Monday, April 23, 1984. (3rd case)
Apr 16 1984	Reply brief of petitioners Morris Thigpen, Commr., MS, DOC, et al. filed.
Apr 23 1984	ARGUED.